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# PhD Thesis

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## A Step in the Ladder

An Examination of Practices of being a Tribunal Secretary in  
International Commercial Arbitration

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**A STEP IN THE LADDER: AN EXAMINATION OF PRACTICES OF BEING A  
TRIBUNAL SECRETARY IN INTERNATIONAL COMMERCIAL ARBITRATION**

## **SUMMARY (IN ENGLISH)**

The thesis is a socio-legal examination of the post of Tribunal Secretary in International Commercial Arbitration. A tribunal secretary is an assistant to the arbitral tribunal to whom the tribunal delegates certain duties and tasks. This research asks the question - what does it mean to be a tribunal secretary. As a result, the thesis is an investigation on tribunal secretary's engagement with the arbitral record, carrying out any drafting responsibilities, role during the deliberations of the tribunal and relationship with the ICA community.

In order to study this, the thesis relies on a sociological approach that brings together values, practices and institutions to canvas a holistic picture. By values, what is meant are the ideas and norms that the practitioners want to be seen to be adhering to. By practices, what is meant are the actual activities that are repeated by the practitioners. By institutions, what is meant are the external sanctions that would have a bearing on the actions of the arbitrators and tribunal secretaries.

This is done through a study of the existing literature and combining it with empirical study through semi-structured interviews of arbitrators who have been or worked with tribunal secretaries and tribunal secretaries themselves. The practitioners are largely based in the western jurisdictions though there is still a large group of practitioners from East Asia.

The thesis explores the question of why tribunal secretaries have become inevitable to the practice of ICA. This is due to judicialization and increasing complexity of disputes and moreover, due to historical affinity towards having tribunal secretaries by arbitrators.

It zooms into practices of mastering the file, engaging with drafting responsibilities and role during deliberations in order to construct the picture of what it means to be a tribunal secretary in practice. This zooming in allows to see in fine detail the tasks that tribunal secretaries do while at the same time being mindful of the principle of *intuitu personae*, that is, there are certain duties that the arbitral tribunal has to carry out itself and cannot delegate to the tribunal secretaries. This discussion benefits from the inputs of both the arbitrators as well as tribunal secretaries as to how they navigate this relationship without breaching this principle.

It finally discusses the role this position plays in the formation of the legal profession of ICA. ICA practice lacks any formal licensing requirements. Therefore, carrying out the role and responsibilities of tribunal secretary has a strong correlation with joining the legal practice of ICA because of three reasons, namely, learning by doing, gaining familiarity with the existing

practitioners and ability to network among peers. It presents various career strategies employed by those who act as tribunal secretaries.

## **SUMMARY (IN DANISH)**

Afhandlingen er en socio-juridisk undersøgelse af posten som tribunalsekretær i international kommercial voldgift. En tribunalsekretær er en assistent for voldgiftstribunalet, til hvem tribunalet delegerer visse pligter og opgaver. Denne forskning stiller spørgsmålet - hvad vil det sige at være tribunalsekretær. Som resultat er afhandlingen en undersøgelse af tribunalsekretærrens engagement med voldgiftsoptegnelserne, udførelse af eventuelle udarbejdelsesansvar, rolle under tribunalets overvejelser og forhold til ICA-samfundet.

For at studere dette, benytter afhandlingen sig af en sociologisk tilgang, der samler værdier, praksis og institutioner for at tegne et holistisk billede. Ved værdier menes de idéer og normer, som praktikerne ønsker at blive set efterleve. Ved praksis menes de faktiske aktiviteter, der gentages af praktikerne. Ved institutioner menes de eksterne sanktioner, der vil have indflydelse på voldgiftsmændenes og tribunalsekretærernes handlinger.

Dette gøres gennem en undersøgelse af den eksisterende litteratur og kombinerer den med empirisk undersøgelse gennem semi-strukturerede interviews med voldgiftsmænd, der har været eller arbejdet med tribunalsekretærer, og tribunalsekretærer selv. Praktikerne er hovedsageligt baseret i vestlige jurisdiktioner, selvom der stadig er en stor gruppe praktikere fra Østasien.

Afhandlingen udforsker spørgsmålet om, hvorfor tribunalsekretærer er blevet uundgåelige for ICA-praksis. Dette skyldes juridificering og øget kompleksitet af twister og desuden en historisk tilknytning til at have tribunalsekretærer blandt voldgiftsmænd.

Den zoomer ind på praksis med at mestre filen, engagere sig i udarbejdelsesansvar og rolle under overvejelser for at konstruere billedet af, hvad det vil sige at være tribunalsekretær i praksis. Denne indzoomning gør det muligt at se i detaljer de opgaver, som tribunalsekretærer udfører, mens man samtidig er opmærksom på princippet om intuitu personae, det vil sige, at der er visse opgaver, som voldgiftstribunalet skal udføre selv og ikke kan delegeres til tribunalsekretærerne. Denne diskussion nyder godt af input fra både voldgiftsmænd og tribunalsekretærer om, hvordan de navigerer dette forhold uden at overtræde dette princip.

Til sidst diskutes den rolle, denne position spiller i dannelsen af den juridiske profession af ICA. ICA-praksis mangler formelle licenskrav. Derfor har udførelsen af rollen og ansvaret som tribunalsekretær en stærk korrelation med indtræden i ICA's juridiske praksis på grund af tre årsager, nemlig læring gennem praksis, opnåelse af fortrolighed med de eksisterende praktikere

og evnen til at netværke blandt jævnaldrende. Det præsenterer forskellige karrierestrategier anvendt af dem, der fungerer som tribunalsekretærer.



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## **TABLE OF ABBREVIATIONS**

IAC	International Arbitration Centre
ICA	International Commercial Arbitration
ICC	International Chambers of Commerce
HKIAC	Hong Kong International Arbitration Centre
LCIA	London Court of International Arbitration
SCC	Stockholm Chambers of Commerce
SIAC	Singapore International Arbitration Centre

## CICERO'S PROLOGUE

"Now the people who make teaching their business, after carving up the cases into several categories, provide us with a great supply of arguments for each individual category. This procedure may indeed be more suitable for training young men, so that, as soon as a case is put before them, they know where to go, and from where they can fetch readymade arguments immediately. Nevertheless, it is the slow-witted who follow the rivulets but fail to see the sources, while it is fitting for people who have attained our age and experience to derive what we wish from the fountainhead, and to discern the place from which all things flow."<sup>1</sup>

Cicero, one of the leading historical figures in the late Roman Republic, a philosopher and a writer, wrote these lines in his work on the art of oratory, *De Oratore*. The work is an exposition into how an orator [or, for our times, an advocate] ought to craft arguments. Through the setting of dialogue among his admired orators, Cicero gave a full treatment towards the method of argumentation. To this end, he saw that an orator must not confine himself towards study of the rules alone but ought to draw from wide sources of knowledge. To him, restricting study between rhetoric, philosophy, history or oratory was too rigid an approach.

In his *De Oratore*, he went on to make a very persuasive case that to be able to argue presupposes knowledge from multiple sources so that the orator can both grasp the consequences of his argument and more importantly, make a more persuasive case than when only written text is argued.

Thus, understanding law by assessing its relationship with philosophy, consequences to the society, politics or history goes as far back as when legal treatises were being written. It is not suggest that informing the written text of law through study of other disciplines originated with Cicero. But it is to suggest that restricting study of law only to its rules is insufficient. It is insufficient because it is incomplete. The working of law has real life consequences, for societies, businesses, politics and its practitioners. To divorce this from the study of doctrines

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<sup>1</sup> MARCUS TULLIUS CICERO, CICERO ON THE IDEAL ORATOR (DE ORATORE) (James M. May & Jakob Wisse trans., 2001). Pg. 154

and jurisprudence is to have an incomplete understanding. By this, it is not to argue that doctrinal study of law ought to be rejected. As Cicero states, it is a prerequisite to be a lawyer. What is argued, in this thesis, is that it is necessary to locate the fountainheads of law so as to see navigate it as opposed to be carried along with the flotsams of its rivulets.

This research takes this as its point of departure to study the role of tribunal secretary in international commercial arbitration. It engages with the rules and case laws but doesn't stop there. It navigates ahead to identify its fountainheads of putting these rules into practice and thus, striving to answer what it means to be a tribunal secretary.

# CHAPTER ONE

## INTRODUCTION: BEFORE THE LADDER

“The gatekeeper … in order to reach his diminishing sense of hearing, he shouts at him, “Here no one else can gain entry, since this entrance was assigned only to you. I’m going now to close it.””<sup>2</sup>

“We are the unobtrusive – we could almost be said to ‘lurk’; But make no mistake about it, we’re doing important work. We stand well back in the shadows (except for the Registrar), If you meet us around the building you may not know who we are”<sup>3</sup>

### 1.1. THE INQUIRY

Cicero’s words in the opening pages are obvious and maybe said to be universal for all professions. After all, there are inevitable steps of tutelage and practical learning that forms the bridge joining the theoretical reading to practice of any craft, including, that of profession of law. This is as true of domestic legal practice and as this thesis explores, is true for international commercial arbitration.

What differentiates international commercial arbitration is lack of any definite criteria of what makes an international arbitrator or counsel or, in simple words, an international commercial arbitration professional.<sup>4</sup> This thesis is an exploration of one of these paths. This path is the position of tribunal secretary. Very simply, a tribunal secretary provides assistance to an

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<sup>2</sup> Franz Kafka, *Before the Law*, <https://www.kafka-online.info/before-the-law-page2.html> (last visited Jun 12, 2024).

<sup>3</sup> LEGITIMACY OF UNSEEN ACTORS IN INTERNATIONAL ADJUDICATION, (Freya Baetens ed., 1 ed. 2019), <https://www.cambridge.org/core/product/identifier/9781108641685/type/book>. Pg. 611

<sup>4</sup> MIKAËL SCHINAZI, THE THREE AGES OF INTERNATIONAL COMMERCIAL ARBITRATION (2022). Pg. 201

arbitral tribunal. All leading IACs provide for their appointment by the tribunal. And they have been around as long as arbitration has been.<sup>5</sup>

The study of ICA is rich with its practitioners writing research articles as much, if not more, than those in the academia. While, at the same time, there being also a rich tradition of academics being practitioners.<sup>6</sup> The story of origin of ICA is contested. Dezelay and Garth found the origins of ICA in the competition between Grand Old Men and Young Technocrats while Florian Grisel narrated the origins in terms of ‘Secant Marginals’ who collaborated to harmonize procedures from different legal traditions.<sup>7</sup> What is however not fully discussed is how younger aspirants join the practice of ICA. While, Dezelay and Garth made few observations of some of the leading practitioners having acted as tribunal secretaries, yet, what is unclear in this rich tradition of scholarly writing is how the younger aspirants joins its ranks and what strategies do they employ to navigate their careers.<sup>8</sup>

This is fruitful inquiry in and of itself in as much multiple arbitrators who have employed tribunal secretaries or have acted as one have cited significant learning and educational aspects associated with this role.<sup>9</sup> However, it also goes to the core of understanding the practices that shape ICA. The practice of ICA with its strong insistence to the values of confidentiality and privacy makes it that much harder to ascertain how it is practiced in reality.<sup>10</sup> This adds another layer of challenge as well as makes it that much more interesting to research.

Coming full circle to Cicero and the rich tradition of academics as practitioners and practitioners as academics, one needs to inquire as to how this community renews its ranks and ensures that the doctrines and mindset associated with the ICA continues. This is where this

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<sup>5</sup> For historical reference to such a role, refer, Constantine Partasides, *Transparency and the Role of Arbitral Secretaries*, in ARBITRAL SECRETARIES: REPORTS FROM THE JOINT NAI-CEPANI COLLOQUIUM, OCTOBER 5, 2017 1 (Filip De Ly & Luc Demeyere eds., 2018).

<sup>6</sup> YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

<sup>7</sup> Refer Chapter 2 for detailed discussion on these two competing explanations for origins of ICA.; *Id.*; Florian Grisel, *Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession*, 51 LAW & SOCIETY REVIEW 790 (2017).

<sup>8</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pg. 20

<sup>9</sup> For instance, Pierre Lalive, *Inquiétantes Derives de l'arbitrage CCI*, 13 ASA BULL. 634 (1995).; Pierre Lalive, *Un post-scriptum et quelques citations*, 14 ASA BULL. 35 (1996).; Pierre Tercier, *The Role of the Secretary to the Arbitral Tribunal*, in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 532 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014).

<sup>10</sup> Confidentiality is identified as key component to the paradigm of ICA. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM J INT LAW 45 (2013).

inquiry into the role of tribunal secretary comes to fore. It is a post associated with younger practitioners but also touted as imparting education to the coming the generation. It involves working directly with the tribunal on day-to-day basis and usually for the entire duration of arbitration. And, it has had its fair share of controversies in terms of limits of permissible delegation and transparency as to their appointment.<sup>11</sup>

This is where this thesis picks up. It is an inquiry as to who is a tribunal secretary. That is, what does it mean in practice to be a tribunal secretary and how does this post relate to the community of ICA practitioners.

This research is an inquiry as to **who is a tribunal secretary**. That is, **what does it mean to be a tribunal secretary in practice** and, **how does this post relate to the larger community of ICA practitioners**.

To do this, this research adopts a multi-method approach of studying the institutional rules of leading IACs, case laws from domestic Courts, extant literature and interviewing the practitioners. This is done to holistically engage with the inquiry so that the answer is not deprived of any of these components. The rules and case laws act as institutions in that they signal at what stage sanctions may result. The extant literature reveals the values as well as practices that the practitioners hold, adhere to and carry out competently. The interviews supplements these with insights and experiences of the practitioners themselves.

This allows also to zoom-in to the actual tasks that the tribunal secretaries carry out and the manner in which they carry out. The empirical component of this thesis focuses on the three tensions associated with the duties of tribunal secretaries, namely, *first*, their engagement with the record of the arbitration proceedings; *second*, their role in preparation of drafts of orders and awards and; *third*, their presence during deliberations of the tribunal.

## **1.2. RELEVANCE OF THIS RESEARCH**

There are four areas where this research makes a direct contribution or answers calls for further research. The first is towards understanding of the functioning of international arbitral tribunals. Second, in ascertaining what tribunal secretaries do in practice and how does it relate

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<sup>11</sup> Pierre Tercier, *supra* note 9.; Benjamin F. Hughes, *The Problem of Undisclosed Assistance to Arbitral Tribunals*, in THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 161 (2017).; Olufunke Adekoya, *When Does the Use of an Arbitral Secretary Detract from the “Intuitu Personae” Principle?*, in EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL ARBITRATION 744 (Jean Engelmayr Kalicki & Mohamed Abdel Raouf eds., 2019).

to the rules put in place in the last decade or so. Third, in zooming-in the educational aspect of this role that has been cited in the literature but is need for further detail. Fourth, in answering the inquiry as to how younger professionals navigate their career choices to join the practice of ICA.

Dunoff and Pollack make a forceful case to study “*how international courts actually function*”.<sup>12</sup> The rise in the use of international courts have however not been met with the same degree of scrutiny when it comes to studying their day-to-day workings. This includes their decision-making, processes of deliberations and practices of drafting. Thus, their argument for the need to open the ‘black box’ of what international tribunals do and how do they do it. They as a result state that there is a need to ‘excavate’ this description of judicial practices as judicialization of international courts have continued.

They emphasize that positivist approach ought to be supplemented with the study of practices because of its promise to provide insights into judicial mechanisms that invariably impact judicial decision-making. Thus, the study of judicial behavior means to engage with the practices that are both explicit and the tacit with the goal to study both the actors as well as the larger structures that constrain and enable their actions.

They present a typology of practices that need studying and examination in order to understand international judicial practices.<sup>13</sup> Among this they characterize the role of clerks as part of the practices concerning deliberations and opinion-writing within the larger set of practices that are related to the litigation process itself. They specifically list that arbitral tribunals as one of the international judicial bodies for further study.

In a nutshell, the key relevance of this research is that it answers this call for further research into the practices that shape functioning of international courts. ICA is the leading recourse for transnational commercial and private disputes. And the role of the tribunal secretary therefore has a direct bearing in bettering the understanding of how ICA tribunals function.

This has received interest even from the practitioners themselves. In a similarly titled publication as Dunoff and Pollack’s work, Inside the Black Box, Zachary Douglas specifically

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<sup>12</sup> Jeffrey Dunoff & Mark Pollack, *International Judicial Practices: Opening the “Black Box” of International Courts*, MJIL 47 (2018). Pg. 48

<sup>13</sup> 1 JEFFREY L DUNOFF & MARK A POLLACK, A TYPOLOGY OF INTERNATIONAL JUDICIAL PRACTICES (2018), <https://academic.oup.com/book/32607/chapter/270440890> (last visited Mar 7, 2024). Pg. 93

highlights concerns regarding tribunal secretaries and their drafting responsibilities.<sup>14</sup> He listed series of concerns with the role of tribunal secretary, including their disclosure and delegation of drafting responsibilities by the tribunal. This is not one-off concern as the Yukos arbitration revealed where the person to be contacted in case the presiding arbitrator was not accessible ended up billing the most hours to the parties and was alleged to have played a significant role in drafting the final award.<sup>15</sup> These concerns in turn have prompted calls for laying down guidelines by IACs so as to better regulate their role in the proceedings.<sup>16</sup> These calls have in turn argued for series of values, including that of party consent, to be enshrined in these rules.

Multiple arbitrators have cited the educational aspect associated with the role with approval over the last three decades.<sup>17</sup> This has been emphasized as a practical training and thus, better than being solely trained on the doctrines. Ole Jensen for instance has termed the tribunal secretary as arbitrator's apprentice for this precise reason.<sup>18</sup> However, the literature is sparse as to what the tribunal secretaries do learn as part of this educational aspect. One may readily advance the guess that it is the practice of ICA but that in turn, leads to the inquiry which ones. This research seeks to fill this gap of what tribunal secretaries learn by acting as one and how does it relate to the responsibilities delegated to them.

The practice of ICA is distinct from that of domestic practice of law in that there are no accreditations. That is, there is no licensing requirement to be a practitioner of ICA. This creates a catch-22 problem that how does one practice ICA without being a practitioner of it. While, the seminal work of DeZalay and Garth, *Dealing in Virtue*, and also work of Florian Grisel, have explored the origins of ICA.<sup>19</sup> Yet, there is a clear gap in the research as to how younger aspiring professionals join its practice. Though, one may respond with the quick reply that join a law firm with ICA practice or work with an arbitrator. However, simple though as they

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<sup>14</sup> Zachary Douglas, *The Secretary to the Arbitral Tribunal*, in INSIDE THE BLACK BOX: HOW ARBITRAL TRIBUNALS OPERATE AND REACH THEIR DECISIONS 87 (Bernhard Berger & Michael E. Schneider eds., 2014).

<sup>15</sup> Expert Opinion of Professor George A Bermann (Hulley Enterprises and Ors. v. The Russian Federation 1:14-CV-01996-ABJ), (2015), [https://www.italaw.com/sites/default/files/case-documents/italaw4442\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw4442_1.pdf) (last visited Mar 24, 2023).

<sup>16</sup> For instance, Michael Polkinghorne & Charles B Rosenberg, *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*, 8 DISP. RESOL. INT'L 107 (2014).

<sup>17</sup> For instance, Pierre Lalive, *supra* note 9.; Pierre Tercier, *supra* note 9.; Jean Pierre-Fierens, *An Arbitrator's View on the Expected Assistance from the Arbitral Tribunal's Secretary*, in ARBITRAL SECRETARIES: REPORTS FROM THE JOINT NAI-CEPANI COLLOQUIUM, OCTOBER 5, 2017 111 (Filip De Ly & Luc Demeyere eds., 2018).

<sup>18</sup> J. OLE JENSEN, TRIBUNAL SECRETARIES IN INTERNATIONAL ARBITRATION (First edition ed. 2019). Paras 2.38-2.40

<sup>19</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6.; Florian Grisel, *supra* note 7.

maybe, they do not reveal the career strategies that the younger generation employs as it navigates early years to join the practice. Additionally, as Schinazi has argued that the content of ICA has become technical and specialized<sup>20</sup> and this poses an additional challenge for its practitioners: how to renew its ranks. It is not simply possible to hand over the reins of one's practice to one's best friend or next of kin. Thus, this inquiry of career trajectories and strategies has to be further viewed in this light of renewal of ranks. This research contributes towards this end through interviews as to how the interviewees made the decisions they did and on what basis. Thus adding to the existing literature through discussion of various career strategies that the younger practitioners employ.

### **1.3. STRUCTURE OF THE THESIS**

In light of the foregoing discussion, this thesis has eight chapters with this introduction being the first chapter.

Chapter 2 reviews the literature central to this topic. It covers three broad topics. The first is who constitutes the ICA community. The existing sociological research on this topic is canvassed to show that the ICA community consists of arbitrators, counsels, IACs and academics because they form an issue based community. The second topic that is covered is that of judicialization of ICA. ICA has become more formalized and more so in view of the cases that have become more voluminous and complex. This has had a direct impact on the arbitrators themselves and thus, their need for having tribunal secretaries. The third topic is that of duties of arbitrators. This covers what are the key duties associated with being an arbitrator and in turn, leads to identifying what tasks are non-delegable and thus, the limits on assistance.

Chapter 3 details the research methodology and the design of the empirical study. This thesis adopts a multi-method approach combining a socio-legal approach of studying values, practices and institutions with that of comparative analysis of law and qualitative study done through semi-structured interviews. The socio-legal approach is adopted to be able to study institutional rules, the extant literature along with the practices that are learnt through the interviews. This allows for a more holistic picture in answering the research questions. The comparative analysis allows to study the overlaps and the common features of the institutional rules and case laws that exist. It is also an obvious choice because the practitioners of ICA themselves heavily rely on this method. Finally, the design of the empirical study is detailed

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<sup>20</sup> MIKAËL SCHINAZI, *supra* note 4. Pgs. 192-201

covering the background information of the interviewees, the conduct of interviews and finally, the coding and theming of the interview transcripts.

Chapter 4 defines what tribunal secretary for this research means. It introduces different types of assistance that are available to a tribunal as well as discusses the rules from leading IACs in order to craft a definition that corresponds to the function of tribunal secretary as well as the benefits from the rules laid down. It explains the choices made for the definition alongside its utility in being able to study the practices of tribunal secretary, including that of undisclosed or informal assistance.

Chapter 5 discusses the engagement with the arbitral record by tribunal secretaries. This is done with the backdrop of judicialization of ICA as a key reason why there is a need for tribunal secretaries. The discussion covers the empirical study in relation to the expected knowledge of the file and connects it with the increase in volume and complexity of ICA. This chapter also discusses the historical debate between Pierre Lalive and Eric Schwartz in 1990s in relation to tribunal secretaries.

Chapter 6 focuses on the two core tasks of drafting and attendance in deliberations. This chapter in this manner directly answers the call for further research made by Dunoff and Pollack.<sup>21</sup> The chapter employs the triad of values, institutions and practices to explore the principle of *intuitu personae*, that is, non-delegation of decision-making responsibilities by the arbitrator. The chapter presents its findings from the empirical study with respect to this principle and its practice. Thereafter, the chapter presents detailed discussion on the practices of drafting responsibilities and attendance during the deliberations. These discussion features answers to detail-oriented questions and hypotheticals that were put to the interviewees in order to gain insight into the practice of law so as that the empirical research is not limited to formalities of law that the interviewees may feel obliged to state. These questions and their rationales are discussed alongside the findings from the empirical study.

Chapter 7 is zoomed-in study of the career strategies employed by tribunal secretaries as they aspire to join the ranks of the ICA community. It commences the discussion by looking at the rules for their appointments and supplements it with the findings from the empirical research to bring out the importance of prior relationships that play key role in appointments. Thereafter, there is a detailed discussion of different career strategies employed by the tribunal secretaries.

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<sup>21</sup> Jeffrey Dunoff and Mark Pollack, *supra* note 12.; 1 JEFFREY L DUNOFF AND MARK A POLLACK, *supra* note 13.

This includes the different avenues to become a tribunal secretary and subsequent pathways after becoming one. The title of the thesis - A Step in the Ladder - owes to this discussion.

Chapter 8 presents the conclusions and findings of this research. It covers the aspirational and learning roles associated with being tribunal secretary. It also presents its findings on drafting responsibilities and attendance during deliberations. Thereafter, the findings on the centrality of principle of *intuitu personae* as a shared value and a component of the social identity is discussed. The chapter concludes with findings on career trajectories as well as short note on the methodology adopted for this research.

There are six appendices to this thesis. They provide the template for emails used to reach out to the respondents, the Interview Consent Form, the GDPR Form, list of interviewees alongside the date of conducting the interview, coding of the questions put to the interviewees and the codebook adopted for coding the transcripts.

## CHAPTER TWO

### LITERATURE REVIEW

“In its current, consolidated form, ICA functions through an institutionalized, private and highly competitive network of centres and expert communities, with a distinctive, evolving regional and global dynamics.”<sup>22</sup>

“whoever comes to oratory after much practice in writing brings this ability along: even when he is improvising, what he says will still turn out to resemble a written text. ... A ship at full speed, when once the rowers rest upon their oars, still maintains its own momentum and course, even though the thrust of the oar strokes has been interrupted.”<sup>23</sup>

“There are indeed schools of thought which insist, explicitly or by implication, that all the distinct values must be reduced ultimately to a single source of importance. .... This anxiety, based on the presumption of some alleged barriers to judging the relative importance of distinct objects, overlooks the fact that nearly all appraisals undertaken as a part of normal living involve prioritization and weighing of distinct concerns, and that there is nothing particularly special in the recognition that evaluation has to grapple with competing priorities.”<sup>24</sup>

#### **2.1. INTRODUCTION**

This chapter is divided into three broad sections. Each section deals with one single idea in its detail. The purpose of this chapter being to survey and present the writings and their ideas. This chapter therefore is contextualization of this thesis in view of the existing literature. The literature covered is from different sources and mediums. It includes books, book chapters from edited volumes, journal articles and empirical studies. The sources include legal research but

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<sup>22</sup> JOANNA JEMIELNIAK, *LEGAL INTERPRETATION IN INTERNATIONAL COMMERCIAL ARBITRATION* (2014). Pg. 1

<sup>23</sup> MARCUS TULLIUS CICERO, *supra* note 1. Pg. 91

<sup>24</sup> AMARTYA SEN, *THE IDEA OF JUSTICE* (2010). Pg. 395

also benefits from sociological and historical studies. This is so as to develop a holistic and broad picture of the extant knowledge.

Through this chapter, the forest of existing knowledge is presented so that the contribution from this thesis can be readily identified. In this way, the present thesis attempts to engage with these contributions, so as to both stand on the shoulders of giants as well as add to their findings.

The first section presents the discussion on practitioners of ICA as a community. This is necessary so as to clarify who is it that is being studied. Tribunal secretary is a position within the arbitral tribunal, directly responsible to the tribunal or the sole arbitrator. Therefore, it is obvious necessity to identify what this community is, how it came to be and what are the implications that flow from such understanding. To this end, both sociological as well as historical studies are considered in order to understand the make-up and functioning of this community.

The second section is a detailed discussion on judicialization of ICA. Again, multiple sources, including legal writings, historical research and personal reflections of the ICA community are considered. This issue is important so as to present the complexity and voluminous nature of the current practice of ICA. Nearly all writings on tribunal secretary has this process of judicialization as an unstated backdrop. The discussion looks at the causes, the consequences and proposed solutions by weaving in the writings of the practitioners along with empirical and historical research.

The final section is on the duties of arbitrator. This is an important section because the normative discussion on tribunal secretaries is refracted through the lens of what is considered eminently personal mandate of the arbitrator or the principle of *intuitu personae*. That is, what tasks and activities an arbitrator has to carry out personally and may not delegate. This section presents this principle as one of the key duties of an arbitrator before delving deeper into its various tensions, including with the needs of efficiency, maintaining trust of the parties and ensuring legitimacy of the arbitration proceedings as well as ICA as a whole. Here again both legal as well as sociological literature is discussed.

## **2.2. THE ICA COMMUNITY**

The ICA community has been argued as an epistemic community<sup>25</sup> undergoing steady professionalization in the last half a century<sup>26</sup> and a service provided to international business<sup>27</sup>. Dezelay and Garth in their seminal and insightful book, *Dealing in Virtue*, made the remark that, “Success in international commercial arbitration, indeed, comes in part by persuading others that the position of particular group and individuals *does* represent international commercial arbitration.”<sup>28</sup> Katharina Pistor makes a similar observation that with passage of time, the private attorneys are the only repeat plays in solving disputes over contracts that they write and thus, are able to act as the spokespersons for law.<sup>29</sup> What both are alluding to is the fact that ICA community shares similarities and have a shared enterprise in providing dispute resolution services to international business.

Dezelay and Garth identified ICA as an epistemic community being organized around certain beliefs around resolution of international disputes privately.<sup>30</sup> They identified two cohorts that were responsible in shaping of ICA, first they called ‘Grand Old Men’ and the second, ‘Young Technocrats’ whom they found to be intense competition with one another.<sup>31</sup> They identified Grand Old Men as renowned professors, judges, Queen’s Counsel and senior partners in law firms who brought visibility and renown of their domestic practice with them.<sup>32</sup> Moreover, this cohort visualized that “Arbitration is a duty, not a career” and that “the person who goes into this business as an arbitrator to make a living should not be encouraged”.<sup>33</sup> They argued that their presence brought personal legitimacy to ICA and in turn, assisted in the development of

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<sup>25</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pg. 16; Andrea Bianchi, *Epistemic Communities in International Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 569 (Thomas Schultz & Federico Ortino eds., 1 ed. 2020), <https://academic.oup.com/edited-volume/41305/chapter/352054648> (last visited Mar 8, 2022).

<sup>26</sup> MIKAËL SCHINAZI, *supra* note 4. Pgs. 196-201

<sup>27</sup> JOSHUA KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW (First edition ed. 2013). Pgs. 100-102; YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pgs. 58-61

<sup>28</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pg. 15

<sup>29</sup> KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019). Pg. 181

<sup>30</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pg. 16

<sup>31</sup> *Id.* Pg. 10

<sup>32</sup> *Id.* Pg. 35

<sup>33</sup> *Id.* Pg. 34

ICA.<sup>34</sup> They argued that as a result of their background and successful careers, they provided legitimacy also the specific approaches to follow that in turn became recognized as ICA.<sup>35</sup>

They argued that ‘Young Technocrats’ were those that promoted their technical competence in the procedure and management of disputes but lacked the charisma to compete with the Grand Old Men.<sup>36</sup> They were new arrivals to ICA being inheritors (or disciples) of Grand Old Men sought to jump the artisanal model, that required them to wait patiently to succeed their mentors, so as to profit from the growth of demand in ICA.<sup>37</sup> Dezelay and Garth argued that the origins of ICA lay in this generational warfare that also saw movement of resolution of disputes done informally towards being a more judicialized one having procedures and doctrines similar to litigation.<sup>38</sup>

What Dezelay and Garth effectively showed that though there were two cohorts of individuals competing for the business of ICA, they argued that their competition produced and promoted the method of resolving international disputes privately and outside the domestic legal systems.<sup>39</sup>

Florian Grisel conducted a historical study to understand the origins of ICA by relying on empirical data provided by International Chambers of Commerce, Paris from 1922 to 1973 of total of 644 ICC cases.<sup>40</sup> He focused on the arbitrators that had more than 10 appointments as an arbitrator. He argued that these men were “secant marginals”, that is, their legitimacy in the respective domestic legal systems were weak. But what distinguished them in arbitration was their ability to mediate between these different domestic legal systems.<sup>41</sup> It was their skill at institutional bricolage, that is, not enhancing a particular national approach but working towards combining various national systems into a new transnational order.<sup>42</sup> He argued that this group’s ability to cherry-pick and combine diverse legal traditions, including reliance on

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<sup>34</sup> *Id.* Pg. 35, footnote 6

<sup>35</sup> *Id.* Pg. 60

<sup>36</sup> *Id.* Pg. 40

<sup>37</sup> *Id.* Pg. 40

<sup>38</sup> *Id.* Pg. 58

<sup>39</sup> *Id.* Pg. 33

<sup>40</sup> Florian Grisel, *supra* note 7.

<sup>41</sup> *Id.* Pg. 799

<sup>42</sup> *Id.* Pg. 821

equity and trade usages, led to establishment of ICA.<sup>43</sup> Moreover, the practice of re-appointments leading to creation of club of arbitrators started as early as 1960s and found that this was due to their ability to navigate different legal systems and develop legitimacy in the transnational space between different legal systems.<sup>44</sup>

Without delving into the debate between DeZalay and Garth's work<sup>45</sup> and Grisel's work<sup>46</sup>, what emerges is a community of practitioners of ICA that have a shared interest in promoting the dispute resolution privately for international business. In process, they built a shared sense of enterprise as well as group identities to both promote themselves as well as ICA.

Moshe Hirsch studying the international investment law sociologically found that the international investment arbitration community to be a social group that shared basic norms as well as valued the opinions of colleagues constituting a close-knit community.<sup>47</sup> He further states that this community is composed of two sub-groups of commercial law and public law background with commercial law paradigm dominating the investment arbitration community.<sup>48</sup>

Anthea Roberts zooming into competition for shaping the investment arbitration argued the presence of differing competing paradigms that effected the analysis and therefore, the solutions to the problems in the interpretation of investment treaties.<sup>49</sup> She argued that the paradigm adopted to conceptualize investment treaty shaped its outcomes. She identified international commercial arbitration as one of the competing paradigms that in turn would lead to prioritization of confidentiality and seeing States as just any other respondent.<sup>50</sup>

Florian Grisel in an empirical examination of data from the 624 cases brought to ICSID since 1972 argues for significant overlap between the ICA elite practitioners and Investment

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<sup>43</sup> *Id.* Pg. 811

<sup>44</sup> *Id.* Pg. 812

<sup>45</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6.

<sup>46</sup> Florian Grisel, *supra* note 7.

<sup>47</sup> Moshe Hirsch, *The Sociology of International Investment Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW 142 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014), <https://academic.oup.com/book/11796/chapter/160863420> (last visited Mar 5, 2024). Pg. 146

<sup>48</sup> *Id.* Pg. 147

<sup>49</sup> Anthea Roberts, *supra* note 10.

<sup>50</sup> *Id.* Pg. 48

arbitration elites.<sup>51</sup> He argued that the ‘secant marginals’ that were responsible for development of ICA from 1920s to 1970s were also appointed as arbitrators during the first two decades of ICSID.<sup>52</sup> Through the examination of appointments of arbitrators, he found that starting from 1994, reappointments increased to almost 50 percent of cases with the period 2005-2017 reaching to 80 percent of all appointments.<sup>53</sup> He further examined this data by studying the background of ICSID arbitrators who obtained more than nine appointments between the period 2005-2017 and concluded that with one exception, everyone were either recognized in ICA or had experience as commercial arbitrators.<sup>54</sup> Further, he found that all the individuals, even when they did not hold positions within academia, regularly engaged in academic debates by publishing articles in specialized reviews. He argued that this was considered prestigious as well as a demonstration of being able to engage beyond one’s own specific legal system.<sup>55</sup> On this basis, he argued that there is a significant overlap between ICA elites and elites of international investment arbitration.<sup>56</sup>

The works of Moshe Hirsch<sup>57</sup>, Anthea Roberts<sup>58</sup> and Florian Grisel<sup>59</sup> lends credence to seeing the practitioners of ICA as a community that is in interaction with itself, shares a basic set of norms, values the opinions of peers and attempts to formulate solutions to concerns that arise within ICA.

Andrea Bianchi has made a strong case for international arbitration as an epistemic community.<sup>60</sup> He argues that international arbitration is an epistemic community because of shared set of ideal that provide for value-based actions for the members of community and that they share causal beliefs, notions of validity in the pursuit of shared common enterprise.<sup>61</sup> He

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<sup>51</sup> Florian Grisel, *Marginals and Elites in International Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 260 (Thomas Schultz & Federico Ortino eds., 1 ed. 2020), <https://academic.oup.com/edited-volume/41305/chapter/352054499> (last visited May 24, 2023).

<sup>52</sup> *Id.* Pgs. 266-267

<sup>53</sup> *Id.* Pg. 268

<sup>54</sup> *Id.* Pgs. 268-273

<sup>55</sup> *Id.* Pg. 273

<sup>56</sup> *Id.* Pg. 275

<sup>57</sup> Moshe Hirsch, *supra* note 47.

<sup>58</sup> Anthea Roberts, *supra* note 10.

<sup>59</sup> Florian Grisel, *supra* note 51.

<sup>60</sup> Andrea Bianchi, *supra* note 25.

<sup>61</sup> *Id.*

argues that what constitutes know of international arbitration, that is what it is and how it works is shaped by them acting as an epistemic community.<sup>62</sup>

For instance, Joshua Karton identifies principle of party autonomy as one of the norms arising from the values shared by ICA arbitrators.<sup>63</sup> He states that this norm constrains the power and actions of arbitrators that theoretically may have very little constraint.<sup>64</sup> This principle in turn influences the procedure for conducting the arbitration as well as substantive aspects of the dispute. That is, it effects the choice of governing law, applicable evidentiary rules as well as control over the schedule of the dispute and issues that are to be decided by the arbitrators.<sup>65</sup> Underlying this, the norm of party autonomy has become a social norm shared by the arbitrators for both conducting the arbitration as well as justifying their own actions.<sup>66</sup>

Returning back to Andrea Bianchi's work on Epistemic Communities in International Arbitration<sup>67</sup>, this community consists of a large set of individuals. They are centered around ICA arbitrators and lawyers. Arbitrators are of course a key participant being one of the three necessary components [the other two being the parties] for arbitration proceedings to exist.<sup>68</sup> Arbitration lawyers are the next important category and usually consist of multi-member teams who advise and represent the parties.<sup>69</sup> Professors and those connected with academia are also an integral part of this community with the practitioners also engaging in academic activities alongside their professional commitments.<sup>70</sup> Equally important is the fact that all leading members of this community hold these positions, be it arbitrator, arbitration lawyer or an academic or engaging in academic debates, at differing points of their professional careers or have built professional alliances with each other.<sup>71</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> JOSHUA KARTON, *supra* note 27. Chapter 4

<sup>64</sup> *Id.* Pg. 85

<sup>65</sup> *Id.* Pgs. 78-90

<sup>66</sup> *Id.* Pgs. 85-90

<sup>67</sup> Andrea Bianchi, *supra* note 25.

<sup>68</sup> ALEC STONE SWEET & FLORIAN GRISSEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY (First edition ed. 2017). Pg. 20 argues that the presence of a "triad" consisting of parties and dispute resolver is natural consequence for formalization of arbitration.

<sup>69</sup> Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARBITRATION INTERNATIONAL 1 (2015). Pg. 5

<sup>70</sup> Florian Grisel, *supra* note 51.; YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pgs. 34-42

<sup>71</sup> Florian Grisel, *supra* note 51.; Yves Dezelay & Bryant G. Garth, 'Lords of the Dance' as Double Agents: Elite Actors in and around the Legal Field, 3 JOURNAL OF PROFESSIONS AND ORGANIZATION 188 (2016).

Additionally, the arbitral institutions play a key role by providing services to the parties in form of administrative support, clearly delineated rules of procedure as well as connecting them to arbitrators. These institutions in turn compete with each other by regularly updating the best practices and offering services to maximize their own influence as well as client base.<sup>72</sup>

As a result, the members of ICA community are not located in a particular jurisdiction or even a single formal organization.<sup>73</sup> They are spread across the globe, albeit centered around key jurisdictions, who at the same time share a set of common beliefs, tests and notions of validity and have a shared enterprise of promoting ICA as a means for resolving international business disputes.<sup>74</sup> Their socio-cultural distance<sup>75</sup> with each other is shorter even though they may be spread across geographies on account of they engaging in academic debates around common issues<sup>76</sup>, having similar professional backgrounds as attorneys and promoting themselves as members of ICA community.<sup>77</sup>

### **2.3. JUDICIALIZATION OF ICA**

The preceding discussion merits the inquiry as to the reason for existence of such a voluminous records. This in turn is the engagement with the process of judicialization. In a nutshell, it refers to the increase in procedures that resemble litigation. Additionally, the nature of disputes have also increased in their scope and complexity.

This section therefore begins with the discussion of American influence on ICA as a cause for judicialization. It thereafter presents the broader look at the influence of ICA and thus, its judicialization. The purpose being to understand that the phenomena of ICA is transnational and not restricted to a particular geography or practitioners of particular nationality.

It proceeds to discuss the solutions to this problem before moving to the longer discussion of the role that tribunal secretaries play in assisting the arbitrators. In this manner, their role within the larger practice as a consequence of judicialization can be better appreciated. This in turn

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<sup>72</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. pg. 312, “Competition in the products that serve this market produces innovations and changes – but only over the long term.”

<sup>73</sup> Emmanuel Gaillard, *supra* note 69.

<sup>74</sup> Andrea Bianchi, *supra* note 25.

<sup>75</sup> Moshe Hirsch, *supra* note 47.

<sup>76</sup> Florian Grisel, *supra* note 51.

<sup>77</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6.

enables a more firmer grasp as to their usage as well as the expected benefits their role plays in ICA.

Furthermore, it presents the background against which the concerns and potential solutions related to the delegation of duties and tasks to Tribunal Secretaries are discussed. In this manner, this section presents both the values, that is, the practical need as articulated within ICA community to justify reliance on Tribunal Secretary as well as widespread acknowledgment of the practice and its institutionalization are discussed. The key argument here being that while indeed Tribunal Secretaries have come to be employed as a necessary response to increasing judicialization and the same is also reflected in the values of the community but, additionally, it is also now a well-established practice having both historical roots and dispositional affinity within the community.

The discussion builds on the premise of this thesis that that ICA is a heterogenous in terms of sources of law with these sources of law influencing the ICA practice.<sup>78</sup> Therefore, an engagement with the law of ICA involves engaging with these sources of law including, beyond the specific jurisdictions that are subject of this research.

### 2.3.1 JUDICIALIZATION OF ICA

Put simply, the judicialization of ICA refers to the process of making the arbitration procedure more formal and similar to litigation.<sup>79</sup> The trend towards judicialization has been observed in

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<sup>78</sup> More precisely, Joana Lam writes that the body of law called ICA is essentially heterogenous, that is involving multiplicity of laws woven together using comparative law analysis as well as creativity of the professionals in Chapter 12 of LANGUAGE AND LEGAL INTERPRETATION IN INTERNATIONAL LAW, (Anne Lise Kjær & Joanna Lam eds., 2022). Furthermore, refer Gunther Teubner, *Global Bukowina: Legal Pluralism in the World-Society*, GLOBAL LAW WITHOUT A STATE, GUNTHER TEUBNER, ED., DARTSMOUTH 3 (1996). For embrace of study of transnational law as engaging with multitude of sources, including, those beyond the traditional nation-state framework. Additionally, refer, WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE (2009). And William Twining, *Diffusion of Law: A Global Perspective*, 36 THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW 1 (2004). Where he argues to embrace multiplicity of sources of law because legal systems do not work in simple binaries of export of legal rule or institution from one place to another.

<sup>79</sup> Pierre Lalive, The Internationalisation of International Arbitration: Some Observations, in THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE 49, 54 (Martin Hunter et al. eds., 1993); Leahy & Carlos J. Bianchi, The Changing Face of International Arbitration, J. INT'L ARB., Aug. 2000.; Bernard Hanotiau, *International Arbitration in a Global Economy: The Challenges of the Future*, 28 JOURNAL OF INTERNATIONAL ARBITRATION (2011). ; Charles N. Brower, 'Introduction' in Lillich and Brewer , International Arbitration in the 21st Century: Towards Judicialization' and Uniformity; J.-C. Najar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, 25 ARBITRATION INTERNATIONAL 515 (2009).; Fali S. Nariman, *The Spirit of Arbitration: The Tenth Annual Goff Lecture*, 16 ARBITRATION INTERNATIONAL 261 (2000).; Günther J. Horvath, The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes?', STEFAN

both procedural and substantive aspects of international commercial arbitration being referred sometimes as less of ‘alternative dispute resolution and more as ‘offshore litigation’.<sup>80</sup>

The debate of judicialization of ICA has the question of americanization of ICA nested within it. The question of americanization, therefore, has a direct bearing on the origins of judicialization in ICA. Therefore, the engagement with the debate as to the origins allows for understanding the increase in volume of documentation, procedures as well as complexity of the dispute itself.<sup>81</sup>

### 2.3.1.1 Americanization as an Explanation of Judicialization of ICA

The procedural trend is associated with the development of rules that govern and standardize issues related to arbitrators’ disclosure, taking and evaluation of evidence, rendering arbitral decisions with reasons, etc. with the consequence that this has been associated also with increased formalization of the procedure has resulted in extended delays and increased costs.<sup>82</sup> Hanotiau argues that this trend of Americanization have led to the parties and their counsel take more adversarial approach in procedural matters in recent years, leading to a proliferation of practices borrowed from American-style litigation.<sup>83</sup>

Dezalay and Garth documented this trend and associated it with the Anglo-American law firms, whom they termed as “Technocrats” that were involved in competition over the procedures of ICA as they sought to introduce their legal techniques in order to consolidate their own roles within ICA community.<sup>84</sup> In tracing the origin of this process of judicialization with the Technocrats as opposed to the continental professors, “grand old men”<sup>85</sup>, they argued that there were clear differences in both thinking about ICA and the practice of conducting arbitration

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KRÖLL, INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION (2011).

<sup>80</sup> CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION (2014). Para 1.37; Roger P Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69 (2003). Pg. 83

<sup>81</sup> Michal Kaczmarczyk & Joanna Lam, *Sociology of Commercial Arbitration: Tools for the New Times*, 36 JOIA 693 (2019).; Oscar Schachter, *Invisible College of International Lawyers*, 72 NW. UL REV. 217 (1977).; Peter M Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INTERNATIONAL ORGANIZATION 1 (1992).; Jean d’Aspremont, *The Professionalisation of International Law*, in INTERNATIONAL LAW AS A PROFESSION 19 (Jean d’Aspremont et al. eds., 1 ed. 2017), [https://www.cambridge.org/core/product/identifier/9781316492802%23CN-bp-1/type/book\\_part](https://www.cambridge.org/core/product/identifier/9781316492802%23CN-bp-1/type/book_part).

<sup>82</sup> Hanotiau, *supra* note 79.

<sup>83</sup> *Id.*

<sup>84</sup> YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996). Pgs 34-40

<sup>85</sup> *Id.* pg 34

between these two groups. Crucially, they argued that this generation brought with them American procedural methods resulting in protracted document discovery and production alongside expert evidence. In turn, this resulted in formalization, that meant an end of “age of innocence” moving away from “the delightful discipline of a handful of academic *aficionados*”<sup>86</sup>.

Alford had also argued as far back as 2003 that American influence on international arbitration extends beyond the legal framework. That is, he argued that this influence involves presence of institutional personnel and that the Americans held key positions in major arbitration institutions and dispute resolution bodies such as the International Chamber of Commerce, Permanent Court of Arbitration, and the World Trade Organization, the Iran-United States Claims Tribunal, International Centre for Settlement of Investment Disputes, and United Nations Compensation Commission.<sup>87</sup> That is, the competition focused on debating and promoting a particular form of ICA in order to both promote that method as business and then promoting themselves as best placed to carry out this business.<sup>88</sup>

For instance, Pierre Karrer in his recounting behind the adoption of IBA Guidelines on Conflict of Interest specifically cited the “*strategic games*” where the Europeans arbitrators responded to what they perceived as “ridiculous requirements for arbitrators that would have made it impossible for any of the better-known European arbitrators, including those from England, from being appointed.”<sup>89</sup> He concluded that it was for this reason that they adopted it with the result that the Americans backtracked on their proposal.

In sum, the argument being that American influence of ICA has been deep reflected in the introduction of certain practices adopted by U.S. courts, particularly pre-hearing document production (i.e., discovery) and filing practices, at the expense of the speed, efficiency, and low cost of arbitration.<sup>90</sup>

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<sup>86</sup> Jan Paulsson cited in *Id.* pg. 37

<sup>87</sup> Alford, *supra* note 80. Pg 87

<sup>88</sup> Yves Dezelay & Bryant Garth, *Fussing about the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 LAW SOC. INQ. 285 (1996).

<sup>89</sup> PIERRE A KARRER, LAW, PARA-REGULATORY TEXTS AND PEOPLE IN INTERNATIONAL ARBITRATION: PREDICTABILITY OR FUREUR RÉGLEMENTAIRE? (2011). In Stefan M. Kröll , Loukas A. Mistelis , et al. (eds), International Arbitration and International Commercial Law: Synergy and Evolution, pg 299

<sup>90</sup> Carlos J. Bianchi, The Changing Face of International Arbitration 2000; Delissa A. Ridgway, International Arbitration: The Next Growth Industry, DisP. REsOL. J., Feb. 1999. Hanotiau, *supra* note 79.

However, the account of Americanization of ICA has been challenged for not providing a complete picture of the evolution of its practices. In an empirical study that inquired whether there was greater litigiousness before the Courts<sup>91</sup>, Gerbay argued that the trend of judicialization may have stagnated since 1990s.<sup>92</sup> He concluded that while that international arbitration had become more prominent on account of increase in cross-border trade, yet, the trend of judicialization of ICA has not substantially increased in the two decades.<sup>93</sup> In effect, the origin of judicialization of ICA is not a mere transplant of American procedures.

### 2.3.1.2 Explaining Judicialization broadly

The account of the origin of ICA argued by Dezelay and Garth<sup>94</sup> has been recently challenged by Florian Grisel's where he argues that the development of ICA was more of a result of cooperation than competition between two groups of elites.<sup>95</sup> Grisel relying on historical empirical data from the International Chambers of Commerce, Paris from 1922 to 1973, encompassing 644 ICC cases analysed the career trajectories of those arbitrators with more than ten appointments. He concluded that those arbitrators had a weak legitimacy in their domestic legal systems, whom he titled, "secant marginals", but because of their ability to mediate between different legal systems, acquired legitimacy in the international arena.<sup>96</sup> That is, it were their skills in navigating the tensions between different legal systems which in turn led to development of harmonized set of practices and procedures of ICA.<sup>97</sup> Therefore, the emergence of international arbitral procedures was a result of the transplant of different legal traditions or "institutional bricolage". He argued that it was this bricolage or blending of civil law tradition of restrictive discovery with that of common law production that led to the

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<sup>91</sup> One way to assess whether arbitrations are more contentious today than in the past is to examine trends in the number of challenges to arbitrators. The assumption is that parties with more disputes are more likely to challenge the appointment of an arbitrator. Rémy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the 'Judicialization' of International Arbitration*, 25 AMERICAN JOURNAL OF INTERNATIONAL ARBITRATION (2014).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> DEZALAY AND GARTH, *supra* note 84.

<sup>95</sup> Florian Grisel, Arbitration as Dispute Resolution Process: Historical Developments ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3470298](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470298)) (SSRN)

<sup>96</sup> Florian Grisel, *Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession*, 51 LAW & SOCIETY REVIEW 790 (2017).

<sup>97</sup> *Id.*

development of *sui generis* procedure called “document production” as “middle point in an institution building”.<sup>98</sup>

Elena Helmer has also argued in favor of multiplicity of influences, including national arbitral law, role of IACs and growth of international practices as contributing towards an increase in harmonization of procedures employed in practice of International Commercial Arbitration.<sup>99</sup> She discusses how the implementation of IBA Guidelines on Taking of Evidence as well as practices of cross-examination of witnesses reflect a blending of American style discovery and reliance on witnesses as well as continental tradition of relying upon documentary evidence and more limited examination-in-chief of witnesses.<sup>100</sup>

While Vijay Bhatia disagrees with the premise that harmonization of practices have occurred within ICA.<sup>101</sup> He notes the centrality of the background of the arbitrators and the counsels to the procedures that are adopted during the course of arbitration. Yet, he recognizes that judicialization has occurred with methods from litigation being increasingly adopted, especially by those with common law background, in the conduct of arbitration.

Jemielniak has also favored a more broader explanation for judicialization of ICA as having multiple causes including, the desire to avoid “hometown justice”, that is, preference towards international arbitration over national courts on account of needs of business.<sup>102</sup> As a result, the expansion of ICA has resulted in a broad range of issues and subject matters being submitted for decision-making that in turn has led to a professional orientation of arbitrators towards general legal proficiency instead of specialized experience in a relevant branch of trade.<sup>103</sup> Thus, while general arbitrators may have greater expertise in international business law than domestic judges, they lack specialized knowledge about technical aspects of business transactions. And therefore, she argues that judicialization of ICA is the result of multiple

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<sup>98</sup> *Id.*; George M Von Mehren & Alana C Jochum, *Is International Arbitration Becoming Too American*, 2 GLOBAL BUS. L. REV. 47 (2011). Acknowledging the contribution of American law while answering No to the question that the arbitration is too American.

<sup>99</sup> Elena V. Helmer, *International Commercial Arbitration: Americanized, “Civilized”, or Harmonized?*, 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 35 (2003).

<sup>100</sup> *Id.*

<sup>101</sup> Vijay K. Bhatia, *Judicialisation of International Commercial Arbitration Practice: Issues of Discovery and Cross-Examination*, LAPLAND LAW REVIEW 15 (2011).

<sup>102</sup> JEMIELNIAK, *supra* note 22. Pg 96

<sup>103</sup> *Id.* pgs 97-98

factors interlocked with each other such as the need for predictability of awards, predictability of procedure, and avoidance of "hometown justice" by the parties involved in disputes.<sup>104</sup>

Similarly, Schinazi has canvassed the role of French lawyers and jurisprudence in shaping of the doctrines in ICA, including, lex mercatoria and most prominently, Gaillard's arbitral legal order.<sup>105</sup> He discusses the development of lex mercatoria as the beginning of rise of the French school of International Arbitration with Goldman playing a key role in developing the initial ideas in 1950s and 1960s.<sup>106</sup> The key outcome being to argue the presence of a transnational legal order that was not tied to or bound by any single domestic jurisdiction as a set of rules of law.<sup>107</sup> Similarly by 1990s, the second generation, some of whom working with Goldman, developed the next influential theory of autonomous legal order that posited presence of national rules in arbitration and thus, having a significant bearing on the possibility of enforcement an award that had been annulled in country where the arbitration was seated.<sup>108</sup>

In a nutshell, the evolution of the doctrines and principles of ICA are not limited to a single jurisdiction. Thus, while the presence of Anglo-American law firms did introduce some elements of common law procedure<sup>109</sup> but similarly, the continental practice also introduced its own doctrines and practices. As a result, the practice of ICA is not result of influence of one jurisdiction. This holds true for judicialization of ICA as well in that its practice across jurisdictions have faced complaints as to becoming closer to litigation.<sup>110</sup> This has a consequence for this thesis because as the origins of judicialization are not jurisdiction-specific and therefore, the resulting outcomes from it are also not confined to few jurisdictions.

### 2.3.2. CONSEQUENCES OF JUDICIALIZATION

Three factors that define successful practice of ICA are quality, time and costs.<sup>111</sup> However, an attempt at attaining all the three goals - quality of the procedure and the award, the speed of

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<sup>104</sup> *Id.*

<sup>105</sup> MIKAËL SCHINAZI, *supra* note 4.

<sup>106</sup> *Id.* Pgs 204-219.

<sup>107</sup> *Id.* Pg 210.

<sup>108</sup> *Id.* Pgs 250-259.

<sup>109</sup> Elena V. Helmer, *supra* note 99.; DEZALAY AND GARTH, *supra* note 84.; Vijay K. Bhatia, *supra* note 101.

<sup>110</sup> Elena V. Helmer, *supra* note 99.; Also, refer for perspective from Singapore, Sundaresh Menon, *The Complexification of Disputes in the Digital Age*, 30 ASIA PACIFIC LAW REVIEW 1 (2022). And V. K. Rajah, *W(h)ether Adversarial Commercial Dispute Resolution?*, ARBITR INT 17 (2016). Pgs 24-25

<sup>111</sup> Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is It?*, 32 JOURNAL OF INTERNATIONAL ARBITRATION (2015). Calls it Iron Triangle; Same triangle is used by Joerg Risse, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 29 ARBITRATION INTERNATIONAL 453 (2013).; W. W. Park,

conducting the arbitration and keeping the overall costs associated with the arbitration - have been considered wishful at best or requiring a greater cooperation between the parties (albeit recognizing that it may not be possible once the dispute commences).<sup>112</sup>

The concern with judicialization has been borne out in series of empirical surveys. In 2006, the Queen Mary University of London surveyed corporate attitudes and practices related to international arbitration. The results showed that two main disadvantages of this type of arbitration were the high costs and long delays involved.<sup>113</sup> These results echoed in the 2010 survey where evidentiary and document production rules were found to have had an impact on delays of proceedings.<sup>114</sup> The 2015 and 2018 surveys also confirmed costs and delays as the worst aspects of international arbitration.<sup>115</sup> A common theme underlying the increase in delays has been the complaints against “unlimited length of written submissions”, “oral hearings on procedural issues” and “document production”.<sup>116</sup>

Additionally, multi-party proceedings, also known as complex arbitrations, have also witnessed an increase. A 2015 survey for ICC revealed 34% of proceedings involved multiple

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*Arbitrators and Accuracy*, 1 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 25 (2010).; Nariman, *supra* note 79.; Anne Véronique Schläpfer & Marily Paralika, *Striking the Right Balance: The Roles of Arbitral Institutions, Parties and Tribunals in Achieving Efficiency in International Arbitration*, 2 BCDR INTERNATIONAL ARBITRATION REVIEW 329 (2015);

<sup>112</sup> Kirby, *supra* note 111.; Neil Kaplan, *Winter of Discontent*, 34 JOURNAL OF INTERNATIONAL ARBITRATION 373 (2017). Pgs 385-386 arguing for having a good faith clause in PO1 mandating parties to cooperate during the course of arbitration; NAVIN G. AHUJA, TAMING THE GUERRILLA IN INTERNATIONAL COMMERCIAL ARBITRATION: LEVELLING THE PLAYING FIELD (2022), <https://link.springer.com/10.1007/978-981-19-0075-4>. Pgs 67-103 listing series of tactics that parties employ to delay, distract or make the proceedings more expensive; William W. Park, *The Four Musketeers of Arbitral Duty: Neither One-for-All nor All-for-One, in IS ARBITRATION ONLY AS GOOD AS THE ARBITRATOR? STATUS, POWERS AND ROLE OF THE ARBITRATOR* 25 (Yves Derains & Laurent Levy eds., 2015). Presents a slightly different criterion consisting of four factors, namely, accuracy of the award, fairness of procedures, efficiency (time and costs) and an enforceable award.

<sup>113</sup> Pricewaterhouse Coopers -- Queen Mary University International Arbitration Survey 2006 (Corporate Attitudes and Practice) (Queen Mary, University of London 2006)

<sup>114</sup> White & Case -- Queen Mary University International Arbitration Survey 2010 (Choices in International Arbitration) (Queen Mary, University of London 2010)

<sup>115</sup> Paul Friedland & Loukas Mistelis, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, (2015), <https://arbitration.qmul.ac.uk/research/2015/> (last visited Apr 19, 2023).; Paul Friedland & Stavros Brekoulakis, *2018 International Arbitration Survey: The Evolution of International Arbitration*, (2018), <https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> (last visited Apr 19, 2023).

<sup>116</sup> Abby Cohen Smutny & Norah Gallagher, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, (2021), [https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf) (last visited Apr 19, 2023).

parties whereas they accounted only for 20% thirty years ago.<sup>117</sup> Another empirical survey, though with a more limited sample, also highlighted what has been termed as “guerrilla tactics”, where counsels engage in procedural and evidentiary issues to lengthen the proceedings and/or increase the costs for the other party, with 68% of parties having experienced these tactics.<sup>118</sup>

That is, the trend has been that of increase in complexity of cases leading to greater demand on all, including the arbitral tribunal and counsels.<sup>119</sup> Risse characterized this as the “inconvenient truth”. He discussed, albeit set of outlier cases, with one being of 10,000 pages, another involving 120,000 distinct events and third, requiring over twenty plus counsels for each, to present the burgeoning challenge of judicialization that confronts arbitrators today.<sup>120</sup> This reflecting a trend that complexity of cases and higher financial stakes have placed arbitral tribunals under tremendous pressure.<sup>121</sup> The result being that the tribunals are confronted with daunting responsibility of analysing a vast volume of materials that often amount to 10,000 pages or more, in addition to reviewing thousands of exhibits.<sup>122</sup> Admittedly, Risse acknowledged that such cases are not representative of the cases that are routine but, argued that even in cases that are ten-times smaller in size, the complexity of each case does pose a challenge in terms of time devoted for careful reading of submissions in each case because the arbitrators themselves are engaged in multiple cases simultaneously.<sup>123</sup> This echoes a similar observation by Zachary Douglas of being aware of an arbitral proceeding involving over 50,000 pages in submissions by one party.<sup>124</sup> Sundares Menon put it frankly that this

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<sup>117</sup> Christopher R. Drahozal, *Empirical Findings on International Arbitration: An Overview*, in THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 643 (Thomas Schultz & Federico Ortino eds., 1 ed. 2020), <https://academic.oup.com/edited-volume/41305/chapter/352054680>.

<sup>118</sup> Edna Sussman & Solomon Ebere, *All's Fair in Love and War—or Is It? Reflections on Ethical Standards for Counsel in International Arbitration*, 22 THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION (2011).

<sup>119</sup> E Vidak-Gojkovic, L Greenwood & M McIlwrath, *Puppies or Kittens? How to Better Match Arbitrators to Party Expectations*, AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION. MANZ, VIENNA, CH BECK, MUNICH, STÄMPFLI, BERNE 61 (2016); Tanja V Pfitzner & Hans-Patrick Schroeder, *Do We Need a Woolf Reform for International Arbitration*, 1 YB ON INT'L ARB. 175 (2010).; KLAUS PETER BERGER, PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS: NEGOTIATION, MEDIATION, ARBITRATION (Third, revised edition ed. 2015). Paras 16-29 to 16-31

<sup>120</sup> Jörg Risse, *An Inconvenient Truth: The Complexity Problem and Limits to Justice*, 35 ARBITRATION INTERNATIONAL 291 (2019). Begins with the discussion of Hammurabi's code in order to illustrate the magnitude of change that arbitration has gone through since the oldest record.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* Pgs 294-295

<sup>124</sup> INSIDE THE BLACK BOX: HOW ARBITRAL TRIBUNALS OPERATE AND REACH THEIR DECISIONS, (Bernhard Berger & Michael E. Schneider eds., 2014). Pg. 88 where he notes, “In one case I am involved in, thankfully as counsel,

complexity was straining the cognitive ability of the arbitrators with an acceptance that such complexity is going to be a fixture rather than an aberration in coming years.<sup>125</sup>

Put together, this view of being burdened by demands of arbitral procedure has been echoed by arbitrators themselves. In a discussion between interaction between accuracy, fairness and efficiency, a leading arbitrator commented as requiring a balancing act between the need to maintain the credibility of International Arbitration while at the same time minimizing undue expense and delay.<sup>126</sup> To this he further added the dilemma posed for “an ideal arbitrator” as demonstrating high level of knowledge and experience while at the same time being able to have time to attend hearings as urgently as the parties would like.<sup>127</sup>

This two fold-dilemma becomes obvious as the pool of highly experienced arbitrators is often limited with the additional pressures of handling multiple arbitrations simultaneously.<sup>128</sup> In a similar vein, a chief legal officer of a leading company has also commented that the traditional method of arbitration faced with increasing complexities of modern markets and globalized trade is expected to remain a lengthy process.<sup>129</sup>

Thus, ICA today has both evolved out of what Dezelay and Garth found from the “romantic vision” of arbitration and has increasingly been confronted with more complex cases alongside a more formalized and judicial process, leading to borrowing of tactics and procedures from court proceedings.<sup>130</sup>

### 2.3.3. SOLUTIONS PROPOSED FOR JUDICIALIZATION

Multiple solutions have been offered as response to the trend of judicialization over the years. Fali S Nariman argued for return to the nostalgic vision of spirit of arbitration where arbitrators played a greater role in facilitating settlements and employed the techniques of equity as a

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it would take an arbitrator 292 days (assuming a 12-hour working day and 3 minutes to read a page) to review the exhibits filed by one of the parties in one of the rounds of written submissions. Arbitrating, in turn, has become more specialised and increasingly many people do make a living out of being a full-time arbitrator which was not the case twenty years ago.”

<sup>125</sup> Menon, *supra* note 110.

<sup>126</sup> William W Park, *Arbitration in Autumn*, 2 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 287 (2011). pg 291

<sup>127</sup> *Id.* pgs. 310-311

<sup>128</sup> For instance, Anne Véronique Schläpfer and Marily Paralika, *supra* note 111. Pgs 339-341; Najar, *supra* note 79. Pg 523; P. Morton, *Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?*, 26 ARBITRATION INTERNATIONAL 103 (2010). Pg. 106;

<sup>129</sup> Foreward by Michael McIlwrath, Negotiaion: Things Corporate Counsel should know

<sup>130</sup> DEZALAY AND GARTH, *supra* note 84.; Nariman, *supra* note 79.

means of improving efficiency of ICA.<sup>131</sup> William Park too has echoed a similar solution recommending an embrace of amiable composition as a different notion of right that maybe in tension with court decisions or strict contract terms while being able to temper their strictness to respond to the needs of the case.<sup>132</sup> Additionally, Stipanowich and other scholars has also argued for tailoring procedures in view of the individual cases through greater integration between mediation and arbitration processes, with early mediation used to establish a suitable, customized foundation for arbitration along with the arbitrators working towards pre-hearing settlements.<sup>133</sup> Multiple scholars have also advanced a strong case for greater control at early stages of arbitration to promote expeditiousness as well as control costs with establishing of page limits for parties and engaging more inquisitorially with the proceedings.<sup>134</sup>

Morton has advocated for expedited procedures, comparing them to nimbleness of Mini-Cooper as opposed to the Rolls Royce of ordinary procedures, highlighting the benefits of inherent speed and efficiency that would benefit the parties.<sup>135</sup> On the other, Najar quoting

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<sup>131</sup> Nariman, *supra* note 79. At pg 272; Thomas Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 COLUMBIA AMERICAN REVIEW OF INTERNATIONAL ARBITRATION (2014).

<sup>132</sup> Park, *supra* note 111.; Refer Horvarth in KRÖLL, *supra* note 79. At pgs 269-270; For a contrary view refer JEMIELNIAK, *supra* note 22. Pgs 189-192

<sup>133</sup> Stipanowich, *supra* note 131.; Also Risso, *supra* note 120. Pg 310; Park, *supra* note 126.; Hanotiau, *supra* note 79.; Anne Véronique Schläpfer & Marily Paralika, *Striking the Right Balance: The Roles of Arbitral Institutions, Parties and Tribunals in Achieving Efficiency in International Arbitration*, 2 BCDR INTERNATIONAL ARBITRATION REVIEW (2015). Pgs 337-338;

<sup>134</sup> Najar, *supra* note 79. Pg 523; Loukas A Mistelis, *Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: Between Systems Theories and Party Autonomy*, WHAT ELSE (2019). Pg. 25-26; Park, *supra* note 111. Is more forthright, “Yet a more inquisitorial style may commend itself during oral hearings, after party briefs memorialize points of law and evidence. Rather than sitting passively while lawyers perform, arbitrators who engage in robust and direct dialogue with witnesses and counsel can stimulate the mental juices that help connect analytic dots, at least if they avoid seeming to have pre-judged the case, or revealing a failure to read the papers.”; Risso, *supra* note 120.; Paul Friedland and Loukas Mistelis, *supra* note 115. Pg 29 also concurred with more than 50 percent of respondents agreeing with similar proposals as means of enhancing efficiency, namely, “Requirement that tribunals commit to and notify parties of a schedule for deliberations and delivery of final award” “Requirement for early procedural conference” and “Pre-hearing preparatory meeting of the arbitral tribunal”; Pfitzner and Schroeder, *supra* note 119.; Schläpfer and Paralika, *supra* note 133. Pgs 340-341;

<sup>135</sup> Morton, *supra* note 128.; Chan Leng Sun & Tan Weiyi, *Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief*, 6 CONTEMP. ASIA ARB. J. 349 (2013). Further argues for their spread across Asia, “The efficacy of the expedited arbitration process and utility of the emergency arbitrator provisions which have been introduced so far appears to be supported by the statistics of the relevant arbitral institutions. Given this positive experience, it is envisaged that similar developments and trends may be adopted in a more widespread manner in the near future, both in the Asian region and beyond.”; Leon Trakman & Hugh Montgomery, *The ‘Judicialization’ of International Commercial Arbitration: Pitfall or Virtue?*, 30 LEIDEN JOURNAL OF INTERNATIONAL LAW 405 (2017). Para 4.5; Also, Roland Schroeder & Michael McIlwrath, *The View from an International Arbitration Customer: In Dire Need of Early Resolution*, 74 ARBITRATION: THE INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT (2008).

ICC's Task Force underlined that parties' legal costs accounted for 82% of total costs in arbitration before ICC and thus, argued for more hands-on role for in-house counsels in arbitral proceedings.<sup>136</sup>

Also, suggestions have been made to broaden the pool of arbitrators in order to cater to diverse cultural needs and prevent cases from being concentrated in the hands of busy arbitrators.<sup>137</sup> Additionally, it has been proposed that increased oversight by the IACs to ensure appointments are made with consideration of arbitrators' past performance in view of factors like time taken to issue final award and the quality of reasoning.<sup>138</sup> Additionally, it has been argued that soft law can be developed to in order to ensure greater predictability of procedure<sup>139</sup>, while others have argued for the promotion of settlements and mediation as parts of the duties of arbitrators.<sup>140</sup>

All the above proposals are aimed at resolving the concern related to judicialization including improving arbitral procedures, re-looking at the arbitrator's engagement with the parties, re-thinking the role of the in-house counsel or involvement of IACs. Despite the potential of each solution, it is clear that the ICA community is facing both greater number of cases and cases of greater complexity.<sup>141</sup> Moreover, as Kirby has argued solutions to the challenge of judicialization has to be seen beyond saving time and cost because it encompasses three interrelated components: time, cost, and quality.<sup>142</sup> Therefore, she argues that balancing these components while ensuring the correctness and enforceability of the award is challenging

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<sup>136</sup> Najar, *supra* note 79.; Lucy Greenwood, *Keeping the Golden Goose Alive: Could Alternative Fee Arrangements Reduce the Cost of International Arbitration?*, 28 JOURNAL OF INTERNATIONAL ARBITRATION (2011). Discusses the possible consequences of capped fee arrangements on outcomes of pursuing more innovative means to restrict legal representation fees.; Hanotiau, *supra* note 79.

<sup>137</sup> Andreas Respondek, *Five Proposals to Further Increase the Efficiency of International Arbitration Proceedings*, 31 JOURNAL OF INTERNATIONAL ARBITRATION (2014). Pgs 512-513

<sup>138</sup> Nadia Darwazeh, 'Chapter 7: Is Efficiency an Arbitrator's Duty or Simply a Character Trait?' in PATRICIA SHAUGHNESSY & SHERLIN TUNG, THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER (2017). Pgs 63-64

<sup>139</sup> BERGER, *supra* note 119. Para 16-41

<sup>140</sup> Risse, *supra* note 120. Pg 304; Michael McIlwrath, 'Foreword' pg xiv in MICHAEL LEATHES, NEGOTIATION: THINGS CORPORATE COUNSEL NEED TO KNOW BUT WERE NOT TAUGHT (2017).

<sup>141</sup> Refer Section 5.2.1; Schläpfer and Paralika, *supra* note 133. Warn Against thinking of miraculous solutions; Risse, *supra* note 120.

<sup>142</sup> Kirby, *supra* note 111.; Also, William W. Park, 'Arbitration and Fine Dining: Two Faces of Efficiency', in SHAUGHNESSY AND TUNG, *supra* note 138.

requiring arbitral tribunal to exercise discretion when dealing with incomplete, conflicting, and evolving information.

In each of the proposals, what stands out is the engagement of the ICA community as a whole is engaged in a deliberative exercise working towards both the institutions and practice of law. Furthermore, the engagement of the scholars has taken the transnational component, that is, ICA as not being localized to a jurisdiction but involving multiplicity of jurisdictions spread across the world in identification of the problem, analysis of the problem and their respective conclusions.<sup>143</sup> In this manner, this section brings out the shared set of concerns and solutions while also engaging with its transnational character.<sup>144</sup>

#### 2.3.4. SUMMING UP JUDICIALIZATION

For the purpose of this thesis, therefore, it is submitted that the judicialization, that is, increased formalism and emphasis on procedures is here to stay along with, the concern of efficiency, that is, the time consumed from initiation of claim till the rendering of the award.<sup>145</sup> Consequently, by the time of this study, this process of judicialization of ICA had been an inescapable reality of its practice and the discourse of that practice.<sup>146</sup>

The multiple explanations offered as to its existence have a direct bearing on ICA community having values and norms that constitute together its shared episteme.<sup>147</sup> Therefore, in this manner, the response to judicialization, both the explanations as well as suggested solutions,

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<sup>143</sup> More precisely, JEMIELNIAK, *supra* note 22. Pgs 67 and 70 to argue that legal discourse is also the professional discourse where the character of examined materials and communications is predominantly written and prepared by specialist participants. And at 48, “professional and communicative roles play a fundamental function in the development of arbitration discourse” citing Vijay Kumar Bhatia, Christopher Candlin & Maurizio Gotti, *Discourse and Practice in International Commercial Arbitration: Issues, Challenges and Prospects* (2012).; Kaczmarczyk and Lam, *supra* note 81. With the conclusion that: “It can also be seen as a key skill of the members of the expanding group of truly cosmopolitan practitioners, who function in a professional setting that is neither anational, nor domestic.” after their survey of the spread of ICA across the world and proliferation of specialized law programs.

<sup>144</sup> For instance, Teubner, *supra* note 78. Has argued that “a new body of law … emerges from various globalization processes in multiple sectors of civil society independently of the laws of the nation states” and it is “a legal order in its own right which should not be measured against the standard of national legal systems”; Also, Joanna Lam, “Legal interpretation and adjudicatory activism in international commercial arbitration” in LANGUAGE AND LEGAL INTERPRETATION IN INTERNATIONAL LAW, *supra* note 78. Argues for understanding ICA as possessing heterogenous sources of law simultaneously as part of ICA interpretative exercise.; Further refer WILLIAM TWINING, JURIST IN CONTEXT (2019). At page 252 for normative pluralism and legal pluralism as social facts.

<sup>145</sup> BERGER, *supra* note 119. Paras 16-29 to 16-31

<sup>146</sup> Schroeder and McIlwrath, *supra* note 135.; Vidak-Gojkovic, Greenwood, and McIlwrath, *supra* note 119.; Najar, *supra* note 79.pgs 525-526

<sup>147</sup> {Refer Methodology chapter} specifically, Karton, Culture of International Arbitration; Joanna, Legal Interpretation in ICA, Ginsburg

has also been that of the ICA community responding to it through re-articulation of these norms and employing the methods of interpretation.<sup>148</sup>

And thus, coming a full circle – to the quote at the beginning of the chapter where the English arbitrator<sup>149</sup> lamented about being drowned in administrative tasks seeing a secretarial support as an obvious solution, the next section builds on this background to present the case for practical need for Tribunal Secretary.

## **2.4. DUTIES OF ARBITRATOR AND PRINCIPLE OF *INTUITU PERSONAE***

Jan Paulsson states there are five attributes necessary to be an arbitrator - commitment, capability, concern, attentiveness to consequences and condignity.<sup>150</sup> He explains commitment as an arbitrator who is personally and deeply involved in resolving disputes and who would engage with the record to identify and consider all the reasons when pronouncing his decision. He explains capability as the ability of an arbitrator to understand the environment, professional standards and expectations of the parties and, exhibit an ability to ask right questions and to go to the heart of the debate. He explains concern to mean to have a personal and benign interest in the case as well as an ability to spot imprudence or impudence. By being attentive to consequences, he means that the arbitrator understands his decision-making in view of the community as well as future disputants. By condignity, he means excluding arbitrariness, that is, the decisions made are not product of mood, favor or generosity but an outcome of appropriate consequences of the parties' conduct. Jan Paulsson listed these five attributes as one of the archetypal arbitrator.

More concretely, Hunter and Philip summarized the duty of the arbitrator succinctly as being independent of parties and acting in accordance with due process, applicable laws, acquainting themselves with the arbitral record in order to make a reasoned award that fulfils the criteria for being enforceable.<sup>151</sup> Independence is the first duty emphasized by Hunter and Philip to

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<sup>148</sup> {Methodology chapter} Haas, *supra* note 81; Andrea Bianchi, *Epistemic Communities in International Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 569 (Thomas Schultz & Federico Ortino eds., 1 ed. 2020), <https://academic.oup.com/edited-volume/41305/chapter/352054648> (last visited Mar 8, 2022).; Sundresh Menon, Transnational Protection and Emmanuel Gaillard, Sociology of International Arbitration in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION, (David D. Caron et al. eds., First edition ed. 2015).

<sup>149</sup> J. OLE JENSEN, TRIBUNAL SECRETARIES IN INTERNATIONAL ARBITRATION (First edition ed. 2019).

<sup>150</sup> JAN PAULSSON, THE IDEA OF ARBITRATION (1. ed ed. 2013). Pgs. 8-9

<sup>151</sup> Martin Hunter & Allan Philip, *The Duties of an Arbitrator*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 477 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014). Pg. 477

mean that the arbitrators must not be economically dependent or have close family relationships with any of the parties. This in turn means duty to disclose all information necessary to those appointing the arbitrator to be satisfied of his independence.<sup>152</sup> The second duty is to take initiative to commence the proceedings so that the hearings are properly organized and conducted so that the parties have sufficient time to present their case.<sup>153</sup> The third duty is to ensure that due process requirements are met. This means in practice that the parties are treated equally. This does not mean that they are treated equally bad. But instead it means that their right to be heard by the arbitrators is respected and the parties are enabled to put their case and evidence as well as comment on the case and the evidence of the other party.<sup>154</sup> The fourth duty is that the arbitrators personally acquaint themselves with documents and briefs and as a result, conduct the proceedings in view of the case presented by the parties.<sup>155</sup> The fifth duty of the arbitrator is to render an enforceable award that decides all the claims and defenses put forth by the parties supported by proper reasoning.<sup>156</sup>

Rogers and Jeng list five obligations as integral to the ethics of being an international arbitrator.<sup>157</sup> Like Hunter and Philip, they state impartiality and independence as the first obligation. They state that it means showing of risk, potential or appearance of bias and would include behavior that parties perceive as indicating bias or creating a real risk of bias.<sup>158</sup> For instance, they state having direct financial stakes or business dealings with one of the parties maybe seen as having a risk of bias. As a result, there is a duty on the arbitrators to disclose all connections, experiences and relationships that may materially affect the decision-making of the arbitrator.<sup>159</sup> The second obligation is that the proceedings are conducted in accordance with the arbitration agreement.<sup>160</sup> This means giving effect to the procedural agreement between the parties. The third obligation is that of competence and diligence that means to

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<sup>152</sup> *Id.* Pg. 479

<sup>153</sup> *Id.* Pgs. 482-483

<sup>154</sup> *Id.* Pg. 485

<sup>155</sup> *Id.* Pg. 488

<sup>156</sup> *Id.* Pgs. 488-489

<sup>157</sup> Catherine A. Rogers & Jeffrey C. Jeng, *The Ethics of International Arbitrators*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 175 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014).

<sup>158</sup> *Id.* Pgs 193-194

<sup>159</sup> *Id.* Pg. 195

<sup>160</sup> *Id.* Pg. 202

accept appointment only if the arbitrator possesses requisite skills to carry out the proceedings to the issuance of the final award.<sup>161</sup> The fourth obligation is that of confidentiality, that is, the arbitrators would not reveal the information about the proceedings or the outcome.<sup>162</sup> The fifth being to propose settlement in appropriate circumstances.<sup>163</sup>

Gary Born lists six obligations of international arbitrators.<sup>164</sup> These are - first, to resolve the disputes in adjudicatory manner; second, to conduct the arbitration in as per the procedures set forth in the arbitration agreement; third, to maintain confidentiality of the arbitration; fourth, to propose settlements; fifth, to complete his or her mandate as an arbitrator; sixth, to abide by data protection regulations.

Within these obligations, both expressly and implicitly, is the duty to decide the cases. Gary Born for instance specifically identifies it as a duty as part of the first obligation to decide disputes in an adjudicatory manner.<sup>165</sup> He states that this duty means that the arbitrator cannot delegate the duty to decide the case and therefore includes, attending hearings, being part of the deliberations and evaluating the parties' submissions and evidence.<sup>166</sup> As he puts it, "these are the essence of the arbitrator's adjudicative function and they are personal, non-delegable duties."<sup>167</sup> He argues that sending another person to attend hearings or merely signing an award drafted by another would be considered as a breach of this duty and maybe a likely ground for challenging the award.<sup>168</sup>

This echoes the attribute of commitment highlighted by Jan Paulsson that specifically required to deeply and personally engage with the arbitration and its record.<sup>169</sup> Similarly, the duties to acquaint oneself with the briefs and evidence in order to render an enforceable award, as highlighted by Hunter and Philip<sup>170</sup>, and duty of competence and diligence as stated by Rogers

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<sup>161</sup> *Id.* Pg. 203

<sup>162</sup> *Id.* Pgs. 203-204

<sup>163</sup> *Id.* Pgs.- 204-205

<sup>164</sup> GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (Third edition ed. 2021). 13.04

<sup>165</sup> *Id.* 13.04[A][8]

<sup>166</sup> *Id.* 13.04[A][8]

<sup>167</sup> *Id.* 13.04[A][8]

<sup>168</sup> *Id.* 13.04[A][8]

<sup>169</sup> JAN PAULSSON, *supra* note 150. Pg. 8

<sup>170</sup> Martin Hunter and Allan Philip, *supra* note 151. Pg. 477, 482-486, 488-489

and Jeng<sup>171</sup>, all implicitly presume this commitment to engage with the arbitral proceedings personally and not delegating these core duties to a third party.

Partasides calls the duty not to delegate as uncontroversial.<sup>172</sup> He puts it pithily that an arbitrator's mandate is *intuitu personae*, that is, eminently personal because arbitrators are chosen specifically by the parties to resolve their dispute and thus, the arbitrator accepts the duty to not delegate this mandate when accepting an appointment.<sup>173</sup>

Similarly, Draye and Hay highlight that the arbitrators are different from judges in as much they are appointed for resolving a particular dispute as a result of the considerable efforts made by the parties and arbitral institutions to find and appoint the arbitrators.<sup>174</sup> Because of this reason, their role is *intuitu personae*.

Dasser and Igbokwe add to this discussion by referencing the principle of party autonomy arguing it to be the basis for arbitrator's mandate to be *intuitu personae*.<sup>175</sup> They reason that parties exercise their right under the principle of party autonomy in choosing specific individuals on account of their reputation and expertise to adjudicate the dispute and thus, expect the chosen arbitrators to personally perform the task of reaching a decision.<sup>176</sup>

Ole Jensen states this to be the eminently personal nature of the arbitrator's mandate, or *intuitu personae*, having a juridical and contractual dimension to it, all with the view to resolve the dispute of the parties in an adjudicatory manner.<sup>177</sup> He states that parties choose arbitrators expecting a smooth procedure towards resolving their dispute and this means that all tasks involving the conduct of the proceedings are part of the eminently personal mandate of the arbitrators.<sup>178</sup> He lists five basic steps of arbitral decision-making being, first, reading and

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<sup>171</sup> Catherine A. Rogers and Jeffrey C. Jeng, *supra* note 157. Pg. 203

<sup>172</sup> Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARBITRATION INTERNATIONAL 147 (2002).

<sup>173</sup> *Id.*

<sup>174</sup> Maarten Draye & Emily Hay, *The Arbitral Secretary: Unnecessary Nuisance or Unsung Hero – A Practitioner's View*, in ARBITRAL SECRETARIES: REPORTS FROM THE JOINT NAI-CEPANI COLLOQUIUM, OCTOBER 5, 2017 81 (Filip De Ly & Luc Demeyere eds., 2018).

<sup>175</sup> Felix Dasser & Emmanuel O. Igbokwe, *The Award and the Courts, Efficient Drafting of the Arbitral Award: Traditional Ways Revisited – Lesson Learned from the Past?*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2019 (2019) 279 (2019). Pg. 296

<sup>176</sup> *Id.* Pg. 296

<sup>177</sup> J. OLE JENSEN, *supra* note 18. Paras 5.05-5.06

<sup>178</sup> *Id.* Para 5.55

listening to the parties' submissions; second, establishing facts of the case; third, identifying the contents and applying the applicable law(s); fourth, applying the law to the facts and being part of the deliberations to reach an outcome and; fifth to record the decision along with its reasoning.<sup>179</sup>

With regard to the first step, he states that having a strong knowledge of the arbitral case file and considering the evidence and arguments by the parties are essential to arbitrator's personal and it involves that the arbitrators reads the briefs and evidence submitted by the parties and listens to their oral submissions.<sup>180</sup> With regard to the second step, he states that taking of the evidence and then evaluating the evidence are crucial to decision-making and thus, is part of eminently personal nature of the arbitrator's mandate.<sup>181</sup> With regard to the third step, he states that the arbitrators have discretion in identifying the applicable law though, the arbitrators have to apply the law where the parties have chosen the law.<sup>182</sup> Since this choice has direct effect on the decision-making, it is too part of the eminently personal nature of the arbitrator's mandate. With regard to the fourth step, he argues that decision-making is in effect application of the law to the facts of the case and it includes participation in deliberations of the tribunal and thus, is also eminently personal to the arbitrator's mandate.<sup>183</sup> With regard to the fifth step, he argues a final award that is well-reasoned and clarifies to the losing party why it has lost with the knowledge that the arbitrators considered all of its arguments are crucial to safeguarding the intellectual control over the award.<sup>184</sup> Therefore, the drafting of substantive portions, that is, the decision and its reasoning, are core purpose of arbitration itself and therefore, the eminently personal part of the arbitrator's mandate.<sup>185</sup>

What emerges from the foregoing discussion is that the duty to decide is one of the key duties of the arbitrators and that this duty cannot be delegated because it is eminently personal, or *intuitu personae*, to the arbitrators. This includes series of tasks, commencing from attending the hearings, acquainting with the briefs and evidence submitted by the parties, deciding the

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<sup>179</sup> *Id.* Para 5.65

<sup>180</sup> *Id.* Para 5.67

<sup>181</sup> *Id.* Paras 5.68-5.70

<sup>182</sup> *Id.* Paras 5.71-5.73

<sup>183</sup> *Id.* Paras 5.74, 5.76, 5.78

<sup>184</sup> *Id.* Paras 5.85-5.87

<sup>185</sup> *Id.* Para 5.90

applicable law, establishing the facts of the case, applying the law to the facts of the case and delivering an award with well-drafted reasoning.

Michael Schneider similarly put it succinctly that arbitrators are chosen for their personal qualifications by the parties and therefore, are expected to read the file, attend the hearing, to both the procedural decisions and the final award.<sup>186</sup> However, he adds the caveat that this paradigm existed when the cases were relatively simple with the circumstances changing due to judicialization and increasing complexity of cases necessitating the need for assistance by the arbitrators.<sup>187</sup>

Adekoya in her examination of the principle of *intuitu personae* in view of series of empirical surveys argues that it is being redefined with acceptance of tribunal secretaries and restricting this principle towards decision-making process.<sup>188</sup>

This has led to series of tensions with regard to arbitrators delegating tasks to tribunal secretaries. Partasides in the highly-cited article, *The Fourth Arbitrator*<sup>189</sup>, that also has given a very recognized moniker with respect to tribunal secretaries, highlighted this concern very simply as “what is it that secretaries to tribunals actually do?”<sup>190</sup> He explained that there was a suspicion that tribunal secretaries were not merely apprentices learning but actually doing the work of the arbitrator.<sup>191</sup> He argued that proper use of tribunal secretaries depends upon the arbitrator where tribunal secretary’s tasks ought to be restricted to highly structured tasks subject to the arbitrator’s review. This he reasons in order to argue that in great majority of cases, both arbitrators and tribunal secretaries fulfill their mandates responsibly and the problem would lie with that particular arbitrator who arbitrator cedes control over the decision-making to the secretary.<sup>192</sup> He put it pithily as “the system should not be fashioned by fear of the irresponsible, for they can undermine any safeguard.”<sup>193</sup> As a result, he argued for two broad guiding rules, first, that the arbitrator should not rely solely on tribunal secretary’s work

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<sup>186</sup> Michael E. Schneider, *Assistance to the Tribunal: Options, Advantages and Dangers*, in INSIDE THE BLACK BOX: HOW ARBITRAL TRIBUNALS OPERATE AND REACH THEIR DECISIONS 73 (Bernhard Berger & Michael E. Schneider eds., 2014). Pgs. 73-74

<sup>187</sup> *Id.* Pg. 74

<sup>188</sup> Olufunke Adekoya, *supra* note 11. Pg. 754

<sup>189</sup> Constantine Partasides, *supra* note 172.

<sup>190</sup> *Id.* Pg. 149

<sup>191</sup> *Id.* Pg. 149

<sup>192</sup> *Id.* Pg. 157

<sup>193</sup> *Id.* Pg. 157

in a manner that excludes his own review of the record and; second, to restrict the tribunal secretary's role in drafting of awards to uncontroversial parts of the award that do not implicate decision-making.<sup>194</sup> In conclusion, he argued against the two extreme views, of a fourth arbitrator, that is, a tribunal secretary whose actions impinges on decision-making role of the arbitrators and a purely administrative secretary.<sup>195</sup>

Polkinghorne and Rosenberg discuss the debate as to the proper role of tribunal secretaries stating that while tribunal secretaries enhance the efficiency of arbitral process enabling the arbitrators to focus on merits and deliver awards more quickly besides lowering costs for the arbitration as a whole but, there are also concerns with regard to the principle of *intuitu personae*.<sup>196</sup> This includes the concern that arbitrators ought to decline appointments if they need assistance of tribunal secretaries because unlike judges, the work of arbitrators is voluntary and moreover, there were concerns that the summarization and research activities of tribunal secretary might influence the arbitrator's own evaluation.<sup>197</sup> They identified topics of contention with regard to tribunal secretaries to include their research tasks, presence during deliberations and role in drafting procedural orders and parts of final award.<sup>198</sup> They argue that the different rules and restrictions on the role of tribunal secretaries has only contributed towards uncertainty as to their duties and that this may negatively impact the perceived legitimacy of arbitration.<sup>199</sup> As a result, they argue for common uniform standards as to the role and duties of the tribunal that explicitly recognizes commitment to the principle of *intuitu personae* with secretaries having no decision-making functions.<sup>200</sup>

Draye and Hay also highlight the debate between the proponents and critics of use of tribunal secretaries with proponents arguing that tribunal secretaries enable focusing on the issues while critics arguing that there is always a possibility that the tribunal secretary may take over either partly or wholly the role of arbitrators.<sup>201</sup> They argue that the solution to this problem lies in adopting three principles to guide the role and conduct of tribunal secretaries. These are first,

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<sup>194</sup> *Id.* Pg. 157-158

<sup>195</sup> *Id.* Pg. 161

<sup>196</sup> Michael Polkinghorne and Charles B Rosenberg, *supra* note 16. Pgs. 109-110

<sup>197</sup> *Id.* Pgs. 109-110

<sup>198</sup> *Id.* Pg. 109

<sup>199</sup> *Id.* Pg. 121

<sup>200</sup> *Id.* Pg. 127

<sup>201</sup> Maarten Draye and Emily Hay, *supra* note 174.

transparency as to the appointment and duties of tribunal secretaries with respect to the parties; second, proper supervision of the tasks of tribunal secretary and; third, non-delegation of any decision-making function.<sup>202</sup> They argue that if these conditions are met, the tribunal secretaries can be of great benefit for both the arbitrators and the parties.<sup>203</sup> That is, with respect to arbitrators, it means benefiting the facilitation of management of dispute and with respect to the parties, it means that the arbitrators can devote more time towards adjudication of the disputes and thus, enhancing the efficiency of the arbitral proceedings.<sup>204</sup>

Jan Schäfer argues for the business case for having tribunal secretaries and argues that as being an arbitrator becomes a living, it requires them to seek assistance so that they can focus on key tasks of the arbitration.<sup>205</sup> This, he argues, means that for full-time arbitrators it is an economic reason to outsource time consuming tasks to lower paid lawyers or staff. He argues that having tribunal secretaries is beneficial for the parties if the logistical and administrative tasks are carried out by the tribunal secretary because it is cheaper to have them carry it out rather than by the arbitrator or the counsels.<sup>206</sup>

Partasides and colleagues, relying on the surveys done by the Young ICCA Task Force in 2012 and 2013, also argue against the conservative position with respect to tribunal secretaries.<sup>207</sup> They argue against conservative position, one that seeks to restrict tribunal secretaries to merely administrative tasks without any responsibility of reviewing the parties' submissions, evidence or summarizing the facts of the case or, any form of drafting.<sup>208</sup> They reason this broadly on two grounds, first, through analogy to judicial decision-making where judges are assisted by clerks and second, through reliance on the Young ICCA surveys where participants approved of tasks beyond purely administrative.<sup>209</sup> Consequently, they argued that dogmatism,

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Jan K. Schäfer, *The Business Case for and against Tribunal Secretaries*, in ARBITRAL SECRETARIES: REPORTS FROM THE JOINT NAI-CEPANI COLLOQUIUM, OCTOBER 5, 2017 9 (Filip De Ly & Luc Demeyere eds., 2018).

<sup>206</sup> *Id.* Pgs. 11-12

<sup>207</sup> Constantine Partasides et al., *Arbitral Secretaries*, in INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE? 327 (Albert Jan Berg ed., 2013).

<sup>208</sup> *Id.* Pgs. 27-28

<sup>209</sup> *Id.* Pg. 28

especially with regard to delegation of drafting responsibilities, was unhelpful leaving it to the individual arbitrator's judgment as to the proper extent of delegation.<sup>210</sup>

Another related concern as to the tribunal secretaries has been the role of arbitrators. De Ly argues that the best guarantee against improper delegation and nature of work done by the tribunal secretaries were arbitrators themselves.<sup>211</sup> After examining the case law and rules and regulations of different arbitral institutions, they argue that it boiled down to the trust that the parties had in their choice of arbitrator and that included how they organized the arbitration proceedings and worked with tribunal secretaries.<sup>212</sup>

Pierre Tercier in his discussion on the role of tribunal secretary also argues for confidence in arbitrators.<sup>213</sup> He reasons that the choice of specific arbitrator implies confidence in the manner that the arbitrator resolves the dispute including, placing confidence in choice of the tribunal secretaries analogous to trust placed in the team of the counsels when parties place choose a particular counsel.<sup>214</sup> He argues, while acknowledging the possibility of abuses, that criticism of arbitrators on account of tribunal secretaries stems from suspicion rather than being grounded on rationality.<sup>215</sup> In turn, he argues that recourse to tribunal secretaries ought to be seen as a professionalization by arbitrators in view of judicialization of ICA.<sup>216</sup> As a consequence, he states that seeking assistance of tribunal secretaries is a legitimate right of the arbitrators.<sup>217</sup>

Tercier also addresses the tension between principle of *intuitu personae* and the delegation of tasks. He argues that the *key question* in this tension is to analyze to what degree and under what circumstances delegation of tasks is being done by the arbitrator.<sup>218</sup> He acknowledges that it is the duty of the arbitrator to personally acquaint himself with the facts and applicable legal

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<sup>210</sup> *Id.* Pg. 28

<sup>211</sup> Filip De Ly, *Rules and Case Law on Tribunal Secretaries*, in ARBITRAL SECRETARIES: REPORTS FROM THE JOINT NAI-CEPANI COLLOQUIUM, OCTOBER 5, 2017 19 (Filip De Ly & Luc Demeyere eds., 2018). Pgs. 35-36

<sup>212</sup> *Id.*

<sup>213</sup> Pierre Tercier, *supra* note 9. Pg. 539

<sup>214</sup> *Id.* Pg. 539

<sup>215</sup> *Id.* Pgs. 542-543

<sup>216</sup> *Id.* Pg. 544

<sup>217</sup> *Id.* Pg. 545

<sup>218</sup> *Id.* Pg. 534

provisions as well as to be part of the deliberations leading up to the decision.<sup>219</sup> He envisages the role of tribunal secretary as not exercising the functions of the arbitrator but making such exercise by the arbitrator easier through preparation and organization of the files.<sup>220</sup> As a result, he argues that what is essential is that all assistance is carried out under specific instructions of the arbitrators.<sup>221</sup>

Jean Pierre-Fierens discusses his practice of working with tribunal secretaries to emphasize the importance of instruction and supervision.<sup>222</sup> He emphasizes the importance of knowledge of the record on the part of the tribunal secretary as a necessary condition of being a tribunal secretary.<sup>223</sup> He acknowledges the role of the tribunal secretary in preparing standard documents while at the same time emphasizing his own role as that involving careful review of all such prepared documents.<sup>224</sup> He also acknowledged the role of tribunal secretary in preparation of procedural parts of the award including description of procedural steps of the proceedings and formal elements of the award as well as factual parts, provided they are reviewed carefully.<sup>225</sup> Fierens presents all this description in order to demystify, to whatever extent it is possible, the role of tribunal secretary and the various tasks that maybe entrusted to him and the role of the arbitrator in instructing and reviewing the output of the tribunal secretary. As a personal experience, he cites a proceeding that was very well organized even though the arbitrator appointed in the proceedings was known to be disorganized and unpunctual.<sup>226</sup> He reasoned that it had to do with the tribunal secretary that ensured proper conduct and timely issue of the award even though he acknowledged that there was a suspicion she may have exceeded her role as a tribunal secretary.<sup>227</sup>

Before concluding this section, it is necessary to highlight the concern as to the legitimacy. Partasides wrote that the legitimacy of arbitral process may be damaged if the concerns as to

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<sup>219</sup> *Id.* Pg. 541

<sup>220</sup> *Id.* Pg. 541

<sup>221</sup> *Id.* Pg. 541

<sup>222</sup> Jean Pierre-Fierens, *supra* note 17.

<sup>223</sup> *Id.* Pg. 113

<sup>224</sup> *Id.* Pg. 112

<sup>225</sup> *Id.* Pg. 116

<sup>226</sup> *Id.* Pg. 118

<sup>227</sup> *Id.* Pg. 118

the proper delegation of tasks to tribunal secretaries was not addressed.<sup>228</sup> Zachary Douglas highlighted this concern that he titled as perfect storm by citing an anecdote of receiving an unsolicited CV that included a proceeding where he himself was a counsel under the heading “Awards that I have drafted”.<sup>229</sup> He stated that this could lead to challenge of awards especially on the ground that some actions of tribunal secretaries were kept secret to the parties and thus, leading to suspicion about their activities.<sup>230</sup>

Benjamin Hughes argued this simply on the ground of transparency that when arbitrators do not disclose receiving assistance, then, in effect amounts to representation that the work performed by the undisclosed assistant is done by the arbitrator.<sup>231</sup> He reasons that in such circumstances, it is difficult to exclude the possibility that the undisclosed assistant is carrying out substantive work including decision-making that ordinarily should have been done by the arbitrator.<sup>232</sup>

Pierre Tercier argues that the legitimacy towards the parties means that the arbitrator renders the award in their name of the proceedings lead by them.<sup>233</sup> He argues that this has two foundations, namely, first contractual mandate under which the arbitrators have a personal mandate that cannot be subcontracted or substituted and; second, a jurisdictional aspect under which arbitrators are obligated to fulfill their functions as per the law so that the final award is enforceable.<sup>234</sup> Thus, in effect having two types of legitimacy, first being parties’ legitimacy under the contract and second, arbitral legitimacy under the relevant provisions of law.

Finally, before concluding this chapter, it is essential to discuss the legal commentary on tribunal secretaries by Ole Jensen.<sup>235</sup> Ole Jensen’s work develops a uniform standard for delegation of tasks to tribunal secretaries and the constitutive ingredients in terms of parties’ consent and disclosures by the tribunal.<sup>236</sup> He terms it the ‘Traffic Light Scale of Permissible Tribunal Secretary Tasks’ to assist parties and arbitrators by suggesting a normative criteria for

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<sup>228</sup> Constantine Partasides, *supra* note 172. Pg. 149

<sup>229</sup> Zachary Douglas, *supra* note 14. Pgs. 87-88

<sup>230</sup> *Id.* Pg. 88

<sup>231</sup> Benjamin F. Hughes, *supra* note 11. Pg. 167

<sup>232</sup> *Id.* Pg. 167

<sup>233</sup> Pierre Tercier, *supra* note 9. Pg. 537

<sup>234</sup> *Id.* Pg. 537

<sup>235</sup> J. OLE JENSEN, *supra* note 18.

<sup>236</sup> *Id.* Appendix E

evaluation of delegation of tasks. It has two key constituents, first, parties' consent and second, specificity of disclosure by the tribunal with respect to the task. This list is in an ascending order of a task in its relationship to the decision-making function of the tribunal. The tasks in green list therefore being administrative and logistical and thus, not even requiring parties' consent to those in orange list requiring parties' consent and those in red list requiring specific disclosure of such delegation by the tribunal when seeking parties' consent. In this manner, this legal commentary is a normative work that studies various tasks that maybe delegated to the tribunal secretary with the goal of developing a uniform criterion for delegation of tasks and subsequent evaluation by the Courts. Thus, the discussion of tasks is limited to listing what the tasks are as opposed to this research that goes beyond the listing of the task to present a picture of what it entails, what are the convergences and divergences in practice and how the tribunal secretaries and arbitrators navigate this delegation of task.

However, the present research is distinct from this work in as much it is geared towards understanding of *hows* of navigating the relationship between the tribunal secretary and the tribunal. That is, this thesis is about the practices carried out within the ICA community in their patterned routines that are competently carried out by the tribunal secretary and the tribunal. It involves discussion of shared values that are articulated to justify as well as causally explain the practices but, this research is not about normative evaluation of whether the practices are justified or ought to be or ought not to be carried out. In this manner, this research side-steps the questions of developing a uniform criteria under which the tasks maybe delegated in order to better present of the *hows* and *whys* of the practices carried out within the ICA community.

Moreover, this study also looks at learning potential, aspirations of younger generation to join the community or become an arbitrator and the causes behind the existence of tribunal secretary. Though, Ole Jensen's work briefly touches on this aspect terming a tribunal secretary as arbitrator's apprentice discussing it as a practical training for those acting as tribunal secretary.<sup>237</sup> But it doesn't delve deeper into the various career trajectories and strategies that those acting as tribunal secretaries employ or the aspirations that of younger members of ICA community in pursuing duties as a tribunal secretary. More specifically, it doesn't delve deeper into what it means to learn as a tribunal secretary, that is, what is the learning opportunity and how this learning opportunity then leveraged by the tribunal secretaries. That is, with what

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<sup>237</sup> *Id.* Paras 2.29-2.36

aspirations and mindset do the tribunal secretaries and arbitrators look at this position in relation to renewing the ranks of this community.

Finally, this research recognizes the contribution of Ole Jensen's treatise in as much it is quoted whenever necessary throughout the work, especially, in relation to choice of the term 'Tribunal Secretary' itself as well as developing a conceptualization of effective supervision. However, this research is sociolegal research in that its purpose is to elucidate what it means to be a tribunal secretary and thus, the discussion of the tasks and aspirations is done through this vantage point as opposed to developing a normative criteria to evaluate it. In this regard, this research is explanatory as opposed to prescriptive. Even in the study of the institutions of ICA, this study presents its findings on that that is widely shared within the ICA community as opposed to evaluating it on touchstone of policymaking or needs of change.

# CHAPTER THREE

## RESEARCH METHODOLOGY AND THE DESIGN OF THE EMPIRICAL STUDY

“As an artist, you trust that. You trust that that is so. You know it is so. You know that whatever your experience, it will give you the material, the “ideas” for your work. … “Idea” is a shorthand way of saying: the material, the subject, subjects, the matter of a story.”<sup>238</sup>

“I must also emphasize at the very beginning that *there are times when coding the data is absolutely necessary, and times when it is most inappropriate for the study at hand.* All research questions, methodologies, conceptual frameworks, and fieldwork parameters are context-specific.”<sup>239</sup>

### 3.1. INTRODUCTION

This is an explanatory thesis, that is, it strives to describe and explain as opposed to prescribe or present what is the right thing to do. Though, the concluding chapter does make few policy prescriptions but throughout the thesis, the thesis confines itself to describe and explain as opposed to prescribe or propose a new normativity.

This is so because this thesis has two interconnected research questions: first, what does it mean to be a tribunal secretary in practice and second, how does being a tribunal secretary fits within the International Commercial Arbitration [hereinafter, ‘ICA’] community. These two inquiries are socio-legal in nature. Thus, the emphasis on explanation. Consequently, these cannot be answered solely either through sociological research or through study of legal doctrine. Thus, this thesis adopts a mixed method approach by incorporating sociolegal method, comparative method and empirical research.

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<sup>238</sup> URSULA K. LE GUIN, THE WAVE IN THE MIND: TALKS AND ESSAYS ON THE WRITER, THE READER, AND THE IMAGINATION (1st ed ed. 2004).

<sup>239</sup> JOHNNY SALDAÑA, THE CODING MANUAL FOR QUALITATIVE RESEARCHERS (3E [Third edition] ed. 2016). Pg. 2

The qualitative research takes the form of semi-structured interviews. This forms the core of the thesis in terms of contributing towards existing literature. Therefore, to give a fuller meaning to these findings, the thesis also discusses the existing literature. By doing so, it engages with the existing literature in order that the findings from this thesis cumulate and contribute towards its evolution.

In this regard, paraphrasing from the work written for science journalists, the attitude adopted is that of “science arbiters”, that is, the purpose is to respond to a scientific question without having any specific recommendation to fix issues or that of a scout out to make a map.<sup>240</sup> What it means for this thesis is to present a full picture of what it means to be tribunal secretary - what do they do, how do they visualize their role, why do they do what they do and how do they fit within the larger ICA community. The examination of these questions among others are presented in the following chapters.

This chapter commences with the discussion on sociolegal method that is a triad of values, practices and institutions in order to have an holistic engagement with the law and its practice. This method is employed to both study the literature as well as design and benefit from the empirical study.

The next section presents the comparative method used in this research. ICA being a transnational practice necessitates comparativism and more so, because it is how even its practitioners engage. Thus, this section has two parts, first, how comparative method is employed by the ICA community and then, how it is employed in this thesis.

The next section details the design of the empirical study. It presents the background of the interviewees, how the interviews were organized and conducted. It then details the codebook framework employed to both develop the questions asked to the interviewees as well as to code their answers. It ends with the discussion on the theoretical considerations and decisions made in order to design the empirical component.

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<sup>240</sup> MARTIN W. ANGLER, TELLING SCIENCE STORIES: REPORTING, CRAFTING AND EDITING FOR JOURNALISTS AND SCIENTISTS (2020). Pg. 19; JULIA GALEF, THE SCOUT MINDSET: WHY SOME PEOPLE SEE THINGS CLEARLY AND OTHERS DON'T (2021). Pg. 21 “A scout might hope to learn that the path is safe, that the other side is weak, or that there's a bridge conveniently located where his forces need to cross the river. But above all, he wants to learn what's really there, not fool himself into drawing a bridge on his map where there isn't one in real life. Being in scout mindset means wanting your “map”—your perception of yourself and the world—to be as accurate as possible.”

Thereafter, the justification for employing a mixed method approach is discussed so as to substantiate the reasoning for adopting three methods. Finally, limitations of this thesis is presented before concluding with the style of writing used in this thesis.

### **3.2. SOCIOLEGAL RESEARCH**

The inquiry into being a tribunal secretary and its role within the larger ICA community involves sociolegal conceptualization. This is because this research is an investigation into ongoing professionalization of the ICA community and within it the inquiry as to how this community renews its ranks. That is, whether the position of tribunal secretary plays any role in the formation of the ICA community.

ICA being highly specialized and technical discipline<sup>241</sup>, it is not possible for its practitioners to simply handing over the reins of a particular task to one's kin or best friend. However, what adds to the complexity is the absence of any licensing mechanism.<sup>242</sup> That is, there is no specific formal course that is mandatory (that each member of this community must complete) or provides a guarantee (that once completed would lead to formal membership within the ICA community) to be an arbitrator or a counsel representing parties in ICA. This adds a layer of complexity that is absent in domestic legal profession where there are specific requirements towards being a judge or an advocate.<sup>243</sup>

This thesis has adopted a triangular conceptual framework of *values*, *practices* and *institutions* in order to answer these questions.<sup>244</sup> This is so because this thesis strives to bring to fore articulations of norms by while at the same time, to present how they act in their day to day tasks alongside the constraints of rules and sanctions that exist.

This section begins with discussion on the reasons behind adopting this triangular approach while also explaining the reasoning behind not adopting other competing approaches. This is followed by discussion on each of the three concepts, namely, values, practices and institutions before concluding this section.

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<sup>241</sup> MIKAËL SCHINAZI, *supra* note 4. Pgs. 196-201

<sup>242</sup> *Id.*

<sup>243</sup> Michal Kaczmarczyk & Joanna Lam, *Sociology of Commercial Arbitration: Tools for the New Times*, 36 JOIA 693 (2019). Argues specifically towards tailoring sociological tools in view of the particular complexity of international arbitration.

<sup>244</sup> *Id.* Pg. 716

### 3.2.1. JUSTIFICATION BEHIND THE TRIANGULAR APPROACH OF *VALUES*, *PRACTICES* AND *INSTITUTIONS*

This research is an inquiry into what it means to be a tribunal secretary and thus, requires answering series of inter-related questions. They can broadly divided into three distinct set of inquiries:

First, under what norms and guiding principles do they justify their actions;

Second, how do they carry out their day to day activities and how these relate it to the norms and guiding principles and;

Third, what set of rules do they identify as controlling their conduct, including, what is permissible and what is not permissible.

These three inter-related inquiries allows for a fuller picture of what tribunal secretaries do, how they engage with arbitrators and how arbitrators engage with them and what rules and principles they articulate. It is for this reason the conceptual framework of *values*, *norms* and *institutions* as articulated by Kaczmarczyk and Lam is adopted.<sup>245</sup>

Before discussing each of these concepts, it is necessary to address two key studies that discuss the formation of legal profession of ICA. First is the seminal work by Dezelay and Garth, *Dealing in Virtue* and the second, is the historical inquiry by Florian Grisel, *Competition and Cooperation in International Commercial Arbitration*.<sup>246</sup> Both the work sought to explain the origins of ICA with the former employing Bourdieusian methodology alongside interview research and the later relying on historical data obtained from ICC, Paris.

Dezelay and Garth inquired the origins of the legal profession of ICA and to that end, they argued that it owed its origins to competition between two cohorts of individuals. They christened the first as ‘Grand Old Men’ and the second as ‘Young Technocrats’.<sup>247</sup> The former were established university professors and leading practitioners in domestic legal systems, like Queen’s Counsels from United Kingdom who saw arbitration as duty and brought significant domestic legitimacy to the practice of ICA.<sup>248</sup> The latter were younger entrants to ICA who were trained in management of disputes and saw themselves as practitioners as opposed to

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<sup>245</sup> *Id.*

<sup>246</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6.; Florian Grisel, *supra* note 7.

<sup>247</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pgs. 34-35, 37-40

<sup>248</sup> *Id.* Pgs. 34-35

being academics and as such promoted their knowledge of procedure and technical competence.<sup>249</sup> Dezelay and Garth relied on almost three hundred interviews in eleven countries to argue that the practice of ICA owed to the generational warfare between these two cohorts and as a result, led to the establishment of the transnational practice of dispute resolution.<sup>250</sup>

Their work has been highly influential for both its grounding in extensive research as well as the breadth of their study encompassing a study of arbitral institutions, generational rivalries, discussion of lex mercatoria and handling of North-South disputes.<sup>251</sup>

However, this research does not adopt their research methodology for three reasons. First, the chief inquiry of this research is not how ICA as a transnational community of practitioners came to be but, acknowledges its existence and zooms-in how younger aspirants navigate their careers to be part of this community. Second, tribunal secretary is a formal position that exists within ordinary arbitral proceedings and thus, is an inquiry as to who populates its and their reasons behind doing so. In this regard, while this position is competitive, there are no identifiable set of cohorts of individuals across jurisdictions like the rivalry canvassed between Grand Old Men and Young Technocrats. Third, this research is also a study of relationship between arbitrators and tribunal secretaries that is not based on competition but on cooperation and trust.<sup>252</sup>

Florian Grisel studied historical empirical data on arbitrators made available by ICC, Paris from 1922 to 1973 totaling to 644 cases to examine the career trajectories of those arbitrators that had been appointed over ten times.<sup>253</sup> Like Dezelay and Garth, he sought to explain the origins of ICA but through study of quantitative data accompanied by career biographies. As a result, he argued that ICA originated through efforts of those practitioners who had weak legitimacy in their own domestic settings but could effectively navigate transnational space by working to blend different traditions and thus, through this bricolage establishing the practice of ICA.<sup>254</sup>

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<sup>249</sup> *Id.* Pgs. 37-40

<sup>250</sup> *Id.* Pgs. 9-10

<sup>251</sup> *Id.*

<sup>252</sup> Senior arbitrators have argued the educating responsibilities of the arbitrators and learning aspect of tribunal secretaries since atleast 1995. For instance, Pierre Lalive, *supra* note 9.; Pierre Lalive, *supra* note 9.; Pierre Tercier, *supra* note 9.; Jean Pierre-Fierens, *supra* note 17.

<sup>253</sup> Florian Grisel, *supra* note 7.

<sup>254</sup> *Id.* Pg. 810

This research does not adopt this approach for three reasons. First, this research is contemporaneous, that is, it seeks to answer the question *in present practice* as opposed to historical origins. This is also one of the limitations of this research in that it does not answer the longitudinal evolution of being a tribunal secretary. This fact is important because arbitral institution's data is kept confidential with even Florian Grisel's study ending in 1973 because of this reason.<sup>255</sup> Second, similar quantitative approach would reveal only the disclosed tribunal secretaries but would stop there. It would not reveal the nature of work, how it was carried out and what it meant professionally for those acting as tribunal secretaries. Finally, such an approach would not reveal the *why's*, that is, the reasoning behind the arbitrators and the tribunal secretaries for doing this work. This last component is important in as much it goes towards answering two key inquiries, namely, why do tribunal secretaries exist and their relationship to the ICA community.

In view of these reasons, this research adopted the triangular conceptual framework accompanied by multimethod approach towards answering the questions.

### 3.2.2. VALUES

Kaczmarczyk and Lam define values as "what people respect and what legitimizes the existence of practices and institutions."<sup>256</sup> By this, they mean the guiding standards that the group seeks to promote or state as a core of individual and collective identities. Implicit in this is the acknowledgment that such value maybe mere articulation and maybe not be a habituated practice.<sup>257</sup>

Here the inquiry focuses on norms and guiding principles articulated by the arbitrators and tribunal secretaries to explain and justify their actions. This means identifying the specific articulations of reasoning behind specific tasks or activities. In simple words, to study values is to zoom-in on this articulation, including norms and guiding principles, that the actors, both the arbitrators and tribunal secretaries, employ. Some of these maybe shared between both the set of actors and some maybe shared only by arbitrators or tribunal secretaries. But what is key is to be able to identify them and the first of the triangle, *values*, effectively captures this phenomenon.

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<sup>255</sup> *Id.* Pg. 798

<sup>256</sup> Kaczmarczyk and Lam, *supra* note 243. Pg. 717

<sup>257</sup> *Id.* Pg. 717

In this respect, it is also similar to the concept of episteme, that is, a shared set of normative and principled beliefs that the ICA community sees as a rationale for their actions.<sup>258</sup> Through them, the members are able to test what actions are valid and upon which they rely to explain causes behind their practices.<sup>259</sup> Bianchi argues for considering the ICA community as an epistemic community on account of the above mentioned reasons, that is, it shares a set of collective beliefs about the practice of ICA, it employs these beliefs as a rationale for actions, as well as validating a set of actions while pursuing a common policy enterprise.<sup>260</sup>

What stands out for this research is the need for identification of these set of collective beliefs with regard to practice of tribunal secretary. These can be broadly relate to three set of actions, first, justifications for activities by tribunal secretaries; second, justifications given by arbitrators for delegating set of activities and; third, articulation of managing relationship between the arbitrators and tribunal secretaries.

Each of these set of beliefs reveals the values that the members of ICA community espouse as a way of legitimating their actions.<sup>261</sup> Moreover, they also simultaneously reveals the social identities that they collectively form, both as members of ICA community and as either arbitrators or tribunal secretaries.

Moshe Hirsch has argued that there are two dynamic elements of social identity, that is, similarities and differences with individuals and groups needing a certain degree of both from others.<sup>262</sup> This in turn enables the individuals and groups to adopt meanings with their particular identity and as a result, act in a particular manner.<sup>263</sup> In his study on *Sociology of International Investment Law*, Hirsch argued that the members of investment arbitration community can be characterized as a social group on account of it sharing basic norms and being concerned about the opinions and respect of their colleagues.<sup>264</sup> Similarly, Gaillard argues that the ICA

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<sup>258</sup> Andrea Bianchi, *supra* note 25.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> Kaczmarczyk and Lam, *supra* note 243.

<sup>262</sup> MOSHE HIRSCH, INVITATION TO THE SOCIOLOGY OF INTERNATIONAL LAW (First edition ed. 2015). Pg. 94

<sup>263</sup> *Id.* Pgs. 94-95

<sup>264</sup> Moshe Hirsch, *supra* note 47.

community, though now expanded to multiple jurisdictions, still engages with itself in determining what is correct doctrine of ICA and how to shape it.<sup>265</sup>

Karton studying the culture of ICA community found a similar set of shared norms among its members with party autonomy and confidentiality being two set of shared norms that its members employed to justify and explain their actions.<sup>266</sup> These values in turn are paradigms or worldviews through which its members evaluate different questions and develop answers towards.<sup>267</sup>

Therefore, a study of value also allows to locate these shared set of values that the members articulate to both explain and justify their actions. In turn, they reveal their social identity and thus, also worldview with which they approach the various tasks.

### 3.2.3. PRACTICES

The study of practices is the second component of the triangle.<sup>268</sup> Kaczmarczyk and Lam define practices as “what people really do, irrespective of the values they have in mind.”<sup>269</sup> These are actions carried out of habit or enforced by conditions of actions. These may include actions arising out of professional relationships, including virtues of solidarity, loyalty or trust.

Dunoff and Pollack citing the work of Meierhenrich and colleagues state the definition of practices as those work activities that are recurrent and meaningful and are carried out in regularized fashion that has bearing on the operation of international court.<sup>270</sup> More specifically, they argue that practices are highly patterned, that is, they take place within organized context, are competent, that is, measured by some subjective standard and rest on background knowledge of a particular discipline.<sup>271</sup>

Dunoff and Pollack identify the role of clerks and/or registry in drafting of opinions as one of the key practices related to international judicial practices.<sup>272</sup> They identify this practice in their

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<sup>265</sup> Emmanuel Gaillard, *supra* note 69.

<sup>266</sup> JOSHUA KARTON, *supra* note 27. Pgs. 78-100

<sup>267</sup> Anthea Roberts, *supra* note 10.

<sup>268</sup> Kaczmarczyk and Lam, *supra* note 243. Pg. 717

<sup>269</sup> *Id.* Pg. 717

<sup>270</sup> Jeffrey Dunoff & Mark A. Pollack, *Practice Theory and International Law*, in RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW 252 (Moshe Hirsch & Andrew Lang eds., 2018). Pg. 262

<sup>271</sup> *Id.* Pg. 263

<sup>272</sup> 1 JEFFREY L DUNOFF AND MARK A POLLACK, *supra* note 13.

study of what international judges do and how they do it. And that the practice theory can also be applied to international arbitral tribunals.<sup>273</sup> In effect, it means that the study of practices of tribunal secretaries and arbitrators to identify what they do and how they do it.

In other words, practices are repetitive activities and actions done by members of ICA community that can be studied because they are patterned and understood as competent and in turn, revelatory of what members of ICA community actually do. For this research, it means identifying these patterned activities that tribunal secretaries undertake, including, engaging with record of the arbitration, engaging with drafting responsibilities and their attendance during deliberations. In order to do so, the empirical study relies on two-prong approach: first, to craft specific hypotheticals in order to elicit replies that reveal how tribunal secretaries act or would have acted and second, to see if a pattern is observable from the respondents.

Dunoff and Pollack recognize that interviews can be a means to understand practices even if there maybe concerns as to poor or incomplete recall or dishonesty.<sup>274</sup> However, those practices that are unobservable, interviews are the only approach to fill the gaps that are there within the extant literature. This is the case with the present research in as much the relationship between the arbitrators and tribunal secretaries is a black box that cannot be observed through fieldwork.<sup>275</sup> Usually, the tribunal secretaries are junior associates with the arbitrator's law firm or work directly with an arbitrator and therefore, their day to day activities are not amenable to observation nor can a large statistical data be obtained for such an analysis.

In sum, practices are what the tribunal secretaries and arbitrators do in their day to day work. It may relate to the values that they articulate but it may also be ambivalent or unrelated to any particular values espoused within the ICA community. The study of practices brings to fore in more concrete terms as to what it means to be a tribunal secretary.

### 3.2.4. INSTITUTIONS

Kaczmarczyk and Lam define institutions as "socially sanctioned patterns of behaviour that constitute significant functions of crucial sectors of the society."<sup>276</sup> They are externally

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<sup>273</sup> *Id.*

<sup>274</sup> Jeffrey Dunoff and Mark A. Pollack, *supra* note 270. Pg. 270

<sup>275</sup> For instance, Zachary Douglas, *supra* note 14.; Constantine Partasides, *supra* note 172.; Olufunke Adekoya, *supra* note 11.; Benjamin F. Hughes, *supra* note 11.

<sup>276</sup> Kaczmarczyk and Lam, *supra* note 243. Pg. 718

enforced being normative in nature to coordinate actions<sup>277</sup> and therefore, include Courts and arbitral institutions. In effect, it includes statutory rules and principles that the Courts are likely to enforce should a question of arbitral proceedings arise before them. It would also include arbitral institutional rules that those particular arbitral institutions would enforce upon tribunals constituted under them.

Therefore, this is the study of rules, law and principles, that as Kaczmarczyk and Lam recognize could be the practical realization of the values<sup>278</sup>. Thus, the study of institutions means also engaging with the values that the ICA community holds but in a manner that arises out of possible sanction or envisaged under an enforcement mechanism. For instance, considerations behind proceedings for setting-aside of an award or removal of arbitrator including, the grounds upon such proceedings are based are termed as institutions.

The institutional rules occupy a slightly different place than domestic arbitral laws in as much they are made by the institutions and thus, does not mean that they would necessarily be enforced by the Courts.<sup>279</sup>

The situation is different for guidelines and best practices. Unlike institutional rules that maybe enforced by the administering institutions where such rules have been adopted by the parties, these lack any specific enforcement mechanism. While, if they are specifically adopted by the parties, they would gain normative force and be contractually binding but the same is not true when called upon in the absence of parties' specific consent.<sup>280</sup> Dasser argues that for such guidelines or best practices, usually called soft law, must meet few minimum requirement to have normative force. He lists three broad requirements, first, that they must have institutional legitimacy, that is, there has to be a some relation between the organization that issued it and the instrument; second, they must have procedural legitimacy, that is, adoption of that instrument must be transparent inspiring credibility among the wider community; third, they must gain acceptance among the wider community, that is, the ICA community should accept the instrument as such.<sup>281</sup>

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<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Institutional rules become binding if the parties' have chosen them but lack normativity in its absence. Refer FELIX DASSER, "SOFT LAW" IN INTERNATIONAL COMMERCIAL ARBITRATION (2021). Pgs. 79-81

<sup>280</sup> *Id.* Pg. 66

<sup>281</sup> *Id.* Pgs. 253-263

To put it simply, a guideline or a statement of best practice in itself does not constitute an institution even though it may reflect certain shared values and even maybe evidence of certain practices accepted and employed by the ICA community. For an instrument to be an institution, it must either be enforceable by Courts on account of it being a law or on account of parties' consent or should have gained such legitimacy to occupy a normative force on its own.

This digression into soft law instruments is important because ICA as a discipline is known for engaging in extensive self-regulation and seeing enacting or developing new guidelines and best practices in view of the collectively identified problems.<sup>282</sup>

### **3.2.5. SUMMING UP**

In sum, the inquiries of what it means to be a tribunal secretary and what role does this position play in the formation of the ICA community requires an engagement with the values that the ICA community shares, the practices that it repeats as part of day to day actions and the institutions that are enforceable and thus, affect the actions of the ICA community. It is through this triad can a holistic response to the research questions developed.

Therefore, the study of literature as well as the empirical study is geared towards identifying these shared values, patterned practices and institutions that effect the work of tribunal secretary and impact the relationship that the arbitrators have with the tribunal secretaries.

## **3.3. COMPARATIVE METHOD AS INSTITUTIONAL BRICOLAGE**

The leading arbitral institutions are dispersed across different jurisdictions and thus, the rules and regulations that concern tribunal secretaries are too from diverse jurisdictions.<sup>283</sup> This thus necessitates a comparative study of these rules and regulations. This is so because ICA is a transnational phenomena that operates from few institutional centers that necessitates filling of the gaps between different domestic legal systems.<sup>284</sup> Therefore, its practitioners engage in bricolage, that is, process of blending rules and laws from different legal systems.<sup>285</sup>

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<sup>282</sup> Michael E. Schneider, *The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and Other Methods Intended to Help International Arbitration Practitioners to Avoid the Need for Independent Thinking and to Promote the Transformation of Errors into "Best Practices"*, in LIBER AMICORUM EN L'HONNEUR DE SERGE LAZAREFF 563 (Laurent Lévy & Yves Derains eds., 2011).

<sup>283</sup> This thesis considers the rules and practice notes issued by leading arbitral institutions, namely, ICC, Paris, LCIA, London, HKIAC, Hong Kong, SIAC, Singapore and SCC, Stockholm.

<sup>284</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pgs 58-61

<sup>285</sup> Florian Grisel, *supra* note 7.

This section first discusses how the comparative method is used by the ICA community before discussing how the comparative method is useful for the study of ICA. This thesis acknowledges this dual aspect of comparative method, where it is a key method to engage with the doctrinaire law by the ICA community to answer questions it faces and, a research method to engage with this transnational nature of ICA, including, its prevalence within its community.

### 3.3.1. INSTITUTIONAL BRICOLAGE: COMPARATIVE METHOD USED WITHIN THE ICA COMMUNITY

Comparative method has flourished in ICA with new *lex mercatoria* being a leading example of its application.<sup>286</sup> It is also key to effective advocacy for arbitration counsel with leading arbitrator, Pierre Lalive, considering its training as essential attribute for an arbitrator.<sup>287</sup> It is noted that the tendency to transnationalize disputes by the arbitrators is possible because of comparative analysis of laws and rules as part of the adjudicatory strategy.<sup>288</sup> More precisely, Joana Lam writes that the body of law called ICA is essentially heterogenous, that is involving multiplicity of laws woven together using comparative law analysis as well as creativity of the professionals.<sup>289</sup> This heterogeneity exists because each international commercial arbitration involves a regulatory web involving elements of party autonomy expressed in their choice of arbitration law, applicable institutional arbitration rules, international arbitration practice and international conventions.<sup>290</sup> Additionally, the absence of rigid procedural rules leads to employing of comparative method to tailoring of a particular international commercial arbitration to its specificities.<sup>291</sup> Even the procedural instruments, like IBA Guidelines on Evidence, are a result of employing comparative method with specific goal to bridge the differences between different legal systems and their approaches to procedural rules and evidence.<sup>292</sup> Schinazi in his historical study has contended that ICA community has employed

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<sup>286</sup> JOANNA JEMIELNIAK, *LEGAL INTERPRETATION IN INTERNATIONAL COMMERCIAL ARBITRATION* (2014). Pg. 129

<sup>287</sup> *Id.* Pg. 129

<sup>288</sup> Joanna Jemielniak, *Comparative Analysis as an Autonomization Strategy in International Commercial Arbitration*, 31 INT J SEMIOT LAW 155 (2018). Pg. 161

<sup>289</sup> Joanna Lam, *Legal Interpretation and Adjudicatory Activism in International Commercial Arbitration*, in LANGUAGE AND LEGAL INTERPRETATION IN INTERNATIONAL LAW 236 (Anne Lise Kjær & Joanna Lam eds., 2022).

<sup>290</sup> JULIAN D. M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* (2003). Paras. 2.42-2.44

<sup>291</sup> Joshua Karton, *International Arbitration as Comparative Law in Action*, 2020 J. DISP. RESOL. 293 (2020). Pg. 310

<sup>292</sup> *Id.* Pg. 309

comparative analysis as part of its doctrine and as a means of harmonization for at least a century.<sup>293</sup>

The cumulative applicability of multiple law usually leads to their cumulative application called *tronc commun*, where the shared aspects of the laws, that is the trunk is applied but the branches where the law are differing is disregarded.<sup>294</sup> Similarly, when faced with circumstances of limited legal guidance in the mosaic of the regulatory web, arbitrators and counsels apply a comparative analysis that may involve considering the laws of parties' home jurisdictions or past colonial rules with the explicit intention that such comparative analyses will respond to the parties' intentions or expectations.<sup>295</sup>

One of the leading writers and arbitrators, Emmanuel Gaillard has argued that determination of transnational rules for a dispute requires comparative method.<sup>296</sup> This involves identification of applicable transnational rules for determining issues present in the case and towards this end, he argues that specific monographs on comparative law are useful source.<sup>297</sup> He has argued that comparative analysis of majority of national laws governing a particular issue ought to be considered as widely-accepted solution and thus, made applicable to an issue for which the rules are absent, unclear or diverging.<sup>298</sup> These questions are not confined merely for final determination of the dispute but pervade the entire arbitral proceeding ranging from the determination of choice of laws to applicable evidentiary rules.<sup>299</sup>

Institutional bricolage results from this combination of basic features from different national systems in order to effectively carry out the adjudicatory function in ICA. This means that laws and cases from different jurisdictions, various institutional rules and numerous guidelines are consulted in order to effectively respond to the questions that arise during an arbitration or in advocating a particular outcome or argument.<sup>300</sup>

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<sup>293</sup> MIKAËL SCHINAZI, *supra* note 4. Pgs. 131-133

<sup>294</sup> Joshua Karton, *supra* note 291. Pg. 302

<sup>295</sup> *Id.* Pg. 313

<sup>296</sup> Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REVIEW 208 (1995).; Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, 17 ARBITRATION INTERNATIONAL 59 (2001). Pgs. 62-63

<sup>297</sup> Emmanuel Gaillard, *supra* note 296.

<sup>298</sup> Emmanuel Gaillard, *supra* note 296. Pgs. 62-63

<sup>299</sup> Joshua Karton, *supra* note 291.

<sup>300</sup> Joanna Lam, *supra* note 289.

This is so because, as Florian Grisel argues, that the members of ICA community had to engage with harmonization of arbitral procedures and they approached it through institutional bricolage or merger of different approaches.<sup>301</sup> This was predicated on comparative analysis of differing and often competing rules in order to arrive at a solution that would gain as wide an acceptance as possible.<sup>302</sup> Moreover, given that it is common that arbitral tribunals will be composed of arbitrators from heterogeneous backgrounds, the counsels develop their arguments to appeal to such diversity and thus, employ comparative advocacy to explain unfamiliar laws in terms of the laws known to the arbitrators.<sup>303</sup>

This is also true for the writings on tribunal secretaries. For instance, Filip de Ly in his discussion on cases and rules on tribunal secretaries discusses multiple institutional rules and case laws from different jurisdictions in order to explicate the rules governing the appointment and conduct of tribunal secretaries as well as his advocacy for certain rules over others.<sup>304</sup> Similarly, Ole Jensen in his commentary on tribunal secretaries engages in comparative analysis of various national laws, institutional rules and cases in order to develop a scale for permissible delegation of tasks.<sup>305</sup> Both writers compare and analyze different national laws and domestic cases in order to answer their specific queries.

Thus, the regulatory web that multiplicity of applicable laws and rules create, the choice of laws by the parties, the problems of diverging rules or absence of rules and the need for effective advocacy has meant that comparative analysis as a bricolage is a feature of the practice of ICA. Its practitioners have not only acknowledged so but consider it essential to an effective practice by its practitioners.<sup>306</sup> In effect, the ICA community recognizes the centrality of comparative method as a means of resolving disputes and this method of approaching questions that it faces is an established feature of its practice.

### 3.3.2. COMPARATIVE METHOD TO STUDY ICA

As canvassed in the preceding sub-section, the doctrines of ICA are predicated on engagement with multiple and competing laws, rules, practice notes alongside best practices and guidelines.

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<sup>301</sup> Florian Grisel, *supra* note 7. Pg. 810 cites the example of procedure for document production as a result of such bricolage.

<sup>302</sup> Joshua Karton, *supra* note 291.

<sup>303</sup> *Id.* Pg. 315

<sup>304</sup> Filip De Ly, *supra* note 211.

<sup>305</sup> J. OLE JENSEN, *supra* note 18.

<sup>306</sup> For instance, Emmanuel Gaillard, *supra* note 296.

As Twining and Anthea Roberts have argued that the discipline of ICA is a distinct sub-culture on account of requirements of expertise with its practitioners developing a distinctive approach towards the practice of law.<sup>307</sup> The ICA community in its own practice engages with this plurality and crafts arguments, advocacy, decisions and writings using comparative analysis. This, in effect, necessitates an engagement with comparative analysis in order to study the institutions of ICA. In other words, comparative method is a necessity to study ICA in as much it is understood so and practiced within the ICA community itself.<sup>308</sup>

Additionally, such an approach is premised on the interdependence of comparative law with legal theory on account of increased transnationalism of the past three decades or so.<sup>309</sup> DeZalay and Garth's work is an excellent illustration of how ICA community in its internal struggles and debates responds to the demands of global businesses while at the same time crafting a ICA as a legitimate means of dispute resolution.<sup>310</sup> More on point, William Twining has argued that comparativism has become significant across legal scholarship because of increasing embrace of ideas from different disciplines and legal traditions.<sup>311</sup> Thus, he has argued for focusing socio-legal research in a particular discipline (being ICA for this research) in context of globalization.<sup>312</sup> In effect, engagement with comparative law is to study the institutions of ICA that is, its sanctions and enforcement, are shaped by domestic Courts or arbitral institutions. This in turns enables an assessment how such institutions are received and diffused across different geographies.<sup>313</sup>

Also, in order to answer the questions of delegated tasks and formation of the ICA community and whether if there is any role of the tribunal secretary in its formation, it is necessary to study the rules made by leading arbitral institutions to regulate their activities. This becomes implicitly obvious in as much the answer to this inquiry means to understand the constraining or enabling (if any) effects of such rules and regulations.

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<sup>307</sup> WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE (2009). Pg. 243; Anthea Roberts, *supra* note 10.

<sup>308</sup> Joshua Karton, *supra* note 291.; Emmanuel Gaillard, *supra* note 296.

<sup>309</sup> TWINING, *supra* note 307. Pg. 244

<sup>310</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6.

<sup>311</sup> TWINING, *supra* note 307. Pg. 244

<sup>312</sup> *Id.* Pg. 244

<sup>313</sup> *Id.* Pg. 250

The approach followed in this thesis reflects this reality of practice of ICA and thus, with that knowledge engages with multiple institutional rules, guidelines and case laws comparatively. This means to begin with the surface law, or the formal text of rules and regulations. But surface law in itself does not reveal much about its interpretation, application or enforcement.<sup>314</sup> Therefore, it is next supplemented with commentaries, writings, including those that employ comparative method to understand how the law is understood and practiced.<sup>315</sup> This involves a comparison of rules, case laws and guidelines to discuss the institutions of ICA. The benefit of consultation of the extant literature is that they contextualize and reveal the purpose, intent or expectations attached with those rules. In this manner, the discussion on institutions of ICA is informed with the insights of its practitioners before proceeding towards a more critical engagement.

However, existing writings valuable as they are and acknowledged so throughout the thesis, they have three limitations, namely, they do not wholly reveal how the practice of tribunal secretaries relate to such rules, gaps within the rules and contingencies that may admit more than one possible answer to a particular issue.<sup>316</sup> Additionally, there maybe concerns with non-compliance of such rules or creative compliance, that is, where they maybe followed in letter but not in spirit. Thus, while the study of institutions led to extensive reference to institutional rules, case laws and commentaries but their relationship to practices and values within the ICA community cannot be answered wholly through such approach.

Therefore, the comparative method in turn requires further exposition through empirical study.<sup>317</sup> The purpose of the empirical study being to understand how these rules and regulations are understood in day to day practice and how the practitioners understand them. This is so because the surface law contains whole spectrum of possibilities and what may appear on surface may not be the case in practice or that, what may appear to be different on surface of different rules and regulations may be practiced in a similar manner.<sup>318</sup>

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<sup>314</sup> WILLIAM TWINING, GLOBALISATION AND LEGAL SCHOLARSHIP (2011). Pg. 44

<sup>315</sup> For instance, Filip De Ly, *supra* note 211.

<sup>316</sup> TWINING, *supra* note 307. Pg. 319

<sup>317</sup> *Id.* Pgs. 243-244

<sup>318</sup> *Id.* Pgs. 317-318

### 3.3.3. SUMMING UP

Comparative method is both part of advocacy tools within the ICA community as well as a necessary route to study it. This is so because it is a transnational community that operates in the spaces between domestic legal systems. Therefore, as a community, it approaches advocacy through comparative lens in order to craft solutions to the problems that it faces.<sup>319</sup>

For this research it means to be aware of this dual aspect of comparative method. That is, it is to recognize that engaging with ICA literature means to engage with the application of comparative method because it is so routinely employed. It also means that studying a particular question, in this case the regulation of tribunal secretaries, would mean to study comparatively different rules and regulations that are present in order to identify their similarities and differences but also to understand their effect on practice.

## **3.4. DESIGN OF THE EMPIRICAL STUDY**

The empirical study was designed in response to the research questions and the conceptual lenses discussed in this chapter. The two key research questions that guided this empirical study were: first, what does it mean to be tribunal secretary in practice and second, how does being tribunal secretary relate to the larger ICA community. Therefore, it meant to learn what activities did tribunal secretaries carry out, how did they navigate their relationship with the arbitrators and how it related to their career priorities. It also meant to learn how the arbitrators who worked with tribunal secretaries see and worked with tribunal secretaries.

Thus, this choice of including the arbitrators was made to ensure to get a more complete picture of work activities of the tribunal secretaries. This is for the obvious reason that tribunal secretaries work directly under the arbitrator who appoints them.<sup>320</sup> Therefore, the day to day tasks as well as the overall working relationship involves the arbitrator as much as the tribunal secretary. In their typology for examining the international judicial practices, Dunoff and Pollack specifically identify the role of clerks, in the case of arbitration tribunal secretaries, as a key research area.<sup>321</sup> Thus, this involves studying the practices of both the arbitrators as well

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<sup>319</sup> Joanna Lam, *supra* note 289.

<sup>320</sup> For instance, L. Yves Fortier, *The Tribunal's Deliberations*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 831 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014).

<sup>321</sup> 1 JEFFREY L DUNOFF AND MARK A POLLACK, *supra* note 13.

as the tribunal secretaries. In other words, to understand the practices of being tribunal secretary requires an appreciation of viewpoint of the arbitrators and without whose perspective the research would have presented only a partial image. To use an analogy, studying the role of tribunal secretary without the perspective of the arbitrators who rely on them would have been to witness a game of chess by looking at movements of pieces of only one color.

### 3.4.1. ORGANIZING THE INTERVIEWS

The interviews were conducted between July 2023 and March 2024. All the interviewees were contacted directly, either in person or through email. The template for such emails is annexed as Appendix A. The template was suitably modified in view of the background of the interviewee.

The email consisted of three components. First, a brief background of myself and my research. Second, the reason behind why I approached that specific interviewee. Third, being description of the interview process, including expected amount of time, confidentiality of the interview and control over attribution / anonymization.

The choice of interviewees was not random. This is so because it was necessary to interview both tribunal secretaries as well as arbitrators who had worked with them. In order to do so, search on the internet was done to locate those who acknowledged working as tribunal secretary, having worked as tribunal secretary or having worked with tribunal secretary. This was done through three search mediums, namely, linkedin, google and google scholar. The choice of linkedin was an obvious one to locate those who were willing to acknowledge their current or past status as a tribunal secretary. Similarly, google search revealed those practitioners that on their personal websites or through participation in conferences or lectures revealed their current or past role as tribunal secretary or having worked with them as an arbitrator. Finally, google scholar turned up important results of practitioners writing on this topic and thus, enabling to narrow down those practitioners that were sharing their professional experience, again either as a tribunal secretary or as an arbitrator working with them. The Table 1 below presents the keywords used to make these searches.

S. NO.	MEDIUM	KEYWORDS USED
1	Linkedin	Tribunal Secretary Arbitral Secretary Administrative Secretary Certified Tribunal Secretary
2	Google	Tribunal Secretary Arbitral Secretary Empaneled Tribunal Secretary Administrative Secretary
3	Google Scholar	Tribunal Secretary Arbitral Secretary Tribunal Secretary Experience Professional role of Tribunal Secretary

*Table 1: Search Keywords*

The interviewees that accepted the invitation were thereafter provided with two forms. First, being an interview consent form and the second, being a form under GDPR seeking consent to process personal data as part of the research. The copies of the two forms are annexed as Appendix B and Appendix C respectively.

The interview consent form had two purposes: first, to seek permission to use the inputs from the interview for this research and for academic writing and second, to allow the interviewees to decide the degree of attribution. The default rule for the latter case was complete anonymization. As a result, there are no block quotations from any of the interviewees in order to keep interviewees anonymous.

The interviewees were explained the nature and purpose of the two forms at the outset of the interviews and were requested to provide a signed copy of each. Some interviewees, who expressed difficulty in providing signed copies, provided their consent through email in response to the email containing the two forms.

With exception of two interviews, all interviews were conducted online through use of Zoom application. All interviews were recorded. The recordings of the interview were thereafter used to prepare a written transcript that was a faithful rendition of the recording. The signed forms and the recordings were shared with each of the interviewees for their record keeping subsequent to the interviews. In total, transcripts ran over 427 pages for a total of over 25 hours

of recording. The interviews ranged from 20 minutes to over an hour with an average of over 40 minutes.

In total 36 interviews were conducted. Of these, 35 interviews are used for this thesis. One interviewee was excluded in the absence of the consent forms. The background details of the interviewees are discussed in the following sub-section.

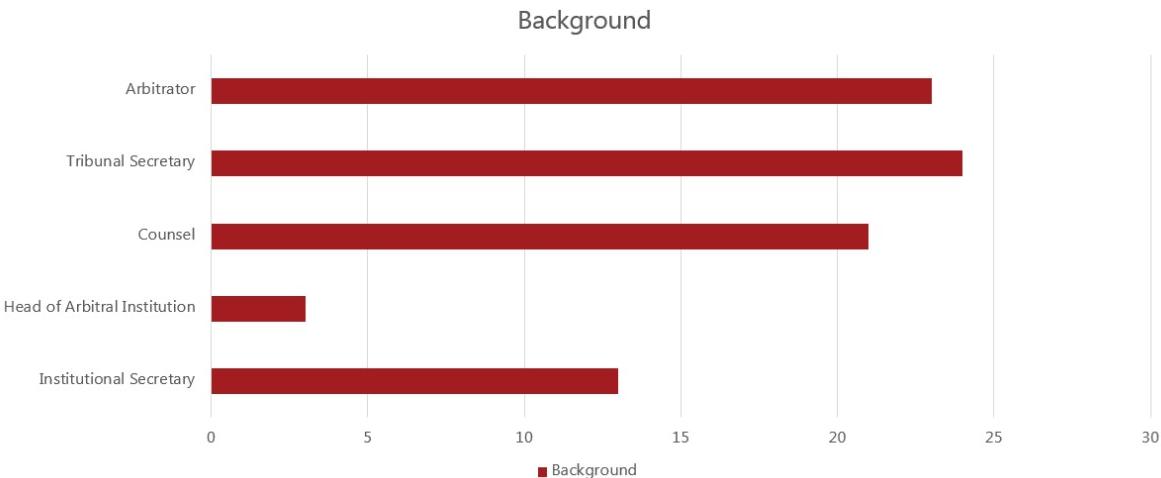
### **3.4.2. THE INTERVIEWEES**

A total of 35 interviews were conducted between July 2023 and March 2024. Every interviewee had either acted (or was acting) as a tribunal secretary or empaneled as a tribunal secretary or had been an arbitrator who had worked with a tribunal secretary. Appendix D gives the list of all the interviewees indicating their background and the date of interview. The details of the interviewees are anonymized and thus, is confined to giving a description of their role and their years of experience in ICA.

#### **3.4.2.1. Background**

The background interviewees was varied. It included tribunal secretaries, institutional secretaries, arbitrators and current and former heads of arbitral institutions. Also, many of the interviewees had a mixed background, that is, they had acted in these capacities at different times in their career. For instance, some arbitrators had acted or were acting as tribunal secretaries.

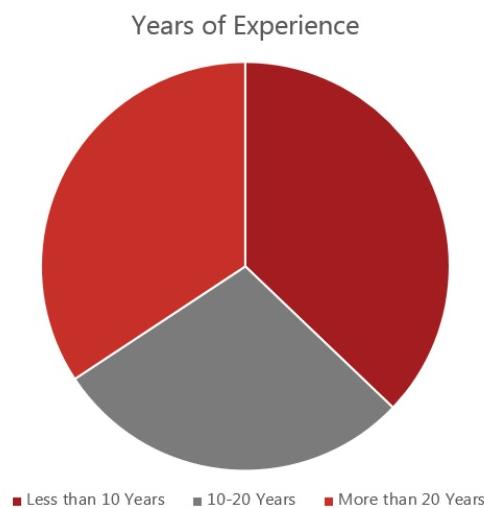
A total of twenty-three interviewees had experience as arbitrators. Twenty-four interviewees had experience as tribunal secretaries. Thirteen interviewees had experience as institutional secretaries while three were current or had experience as former head of arbitral institutions. Twenty-one interviewees had counsel experience. Nine interviewees had experience with teaching. The numbers when added exceed the total number of interviewees for the reason that interviewees had acted in different capacities during their careers, including, arbitrators who had once been tribunal secretaries. Slightly less than half the interviewees, that is, sixteen interviewees had experience as both an arbitrator and a tribunal secretary.



*Chart 1: Background of Interviewees*

#### 3.4.2.2. Years of Experience

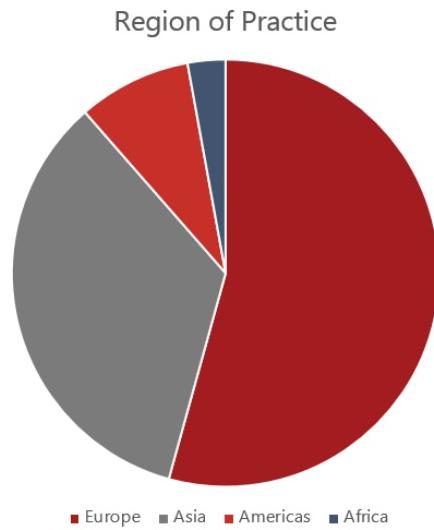
The interviewees also reflect a diverse background in terms of years of experience in international arbitration. Thirteen of the interviewees had less than a decade of experience, ten of the interviewees between ten to twenty years of experience and twelve interviewees over two decades of experience.



*Chart 2: Years of Experience*

#### 3.4.2.3. Region of Practice

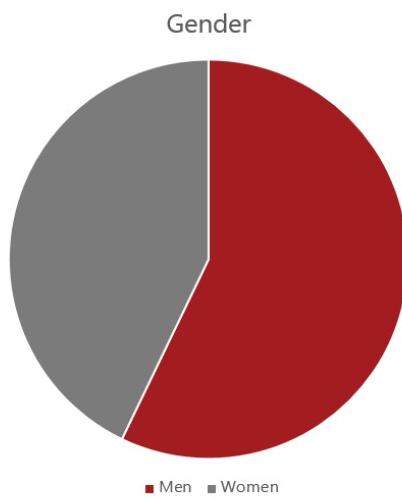
The distribution on region of practice corresponds to the current location/jurisdiction that the interviewees are located as opposed to their region of origin or jurisdiction from where they are qualified to practice. Nineteen of the total participants are from Europe, twelve from Asia (including Australia), three from Americas and one from Africa.



*Chart 3: Region of Practice*

#### 3.4.2.4. Gender

Twenty of the interviewees are men while fifteen are women. That is, the ratio of gender of interviewees was 4:3. Of these, eight men and seven women had experience as both an arbitrator and a tribunal secretary.



*Chart 4: Gender*

#### 3.4.3. CONDUCTING THE INTERVIEWS

This research began with the goal of exploring the role of tribunal secretaries within the ICA community. Thus, it had two chief research questions, first, what does it mean to be a tribunal secretary in practice and second, how does this role fit within the larger ICA community. In

order to answer these questions, it was necessary to further zoom-in into the specificities of being a tribunal secretary. To do this, the existing literature on the tribunal secretaries was consulted extensively. This meant being aware of the literature and the debates in order to put in the details towards both these larger questions that would be understood and seen relevant by the interviewees. As a result, an extensive literature review on tribunal secretaries commencing from Pierre Lalive's debate with Eric Schwartz in early 1990s to series of surveys and articles till date was conducted as a preliminary to developing the interview questions.<sup>322</sup>

The benefit of consulting and being aware of the existing literature was two-fold - first, it led to identification of key areas of concern within the ICA community and second, this in turn assisted in developing the scaffolding for the interviews. The purpose to understand routines, roles and navigation of relationships that were repetitive and seen meaningful was culled out from the literature and in turn informed the development of the interview questions and subsequent coding.<sup>323</sup> The study of the literature ensured that the inquiries were specifically those that were not answered in detail and thus, had space for further contribution.<sup>324</sup> For instance, the learning benefits associated with this role have only been referred in passing and thus, creating scope for further inquiry.<sup>325</sup>

The interviews were designed through synthesis of both the concerns regarding the tribunal secretaries as well as space for further exploration of the different facets connected to this role. Therefore, the interviewees were asked about the nature of delegated tasks to the tribunal secretaries, navigation of these tasks, their relationship with arbitrators, disclosures to the parties, career navigation and causes for their existence. This meant inquiring about range of

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<sup>322</sup> Pierre Lalive, *supra* note 9.; Pierre Lalive, *supra* note 9.; Eric Schwartz, *The Rights and Duties of ICC Arbitrator*, in THE STATUS OF THE ARBITRATOR : SPECIAL SUPPLEMENT. 67 (1995).; Eric Schwartz, *On the Subject of Administrative Secretaries - A Reply by Mr. Eric Schwartz*, *Secretary General of the ICC Court*, 14 ASA BULL. 32 (1996).; Constantine Partasides, *supra* note 172.; Benjamin F. Hughes, *supra* note 11.; Zachary Douglas, *supra* note 14.; Pierre Tercier, *supra* note 9.; Michael Polkinghorne and Charles B Rosenberg, *supra* note 16.; J. OLE JENSEN, *supra* note 18.; Olufunke Adekoya, *supra* note 11.; Constantine Partasides, *Secretaries to Arbitral Tribunals*, in PLAYERS' INTERACTION IN INTERNATIONAL ARBITRATION 84 (Bernard Hanotiau & Alexis Mourre eds., 2012).; YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, (2014).; Paul Friedland & Stavros Brekoulakis, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, (2012), [https://arbitration.qmul.ac.uk/media/arbitration/docs/2012\\_International\\_Arbitration\\_Survey.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf) (last visited Apr 19, 2023).; Sarah Grimmer, *The HKIAC Tribunal Secretary Service: Four Years On*, 20 ASIAN DISP. REV. 160 (2018).

<sup>323</sup> JOHNNY SALDAÑA, *supra* note 239. Pgs. 5-6

<sup>324</sup> For instance, Pierre Tercier, *supra* note 9.; J. OLE JENSEN, *supra* note 18.; Jean Pierre-Fierens, *supra* note 17.; Grimmer, *supra* note 322.; YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, *supra* note 322.; Michael Polkinghorne and Charles B Rosenberg, *supra* note 16.; Zachary Douglas, *supra* note 14.

<sup>325</sup> For instance with regard to learning potential of this post, Pierre Lalive, *supra* note 9.; Pierre Lalive, *supra* note 9.; Pierre Tercier, *supra* note 9.; Jean Pierre-Fierens, *supra* note 17.

issues and relationships, including, administrative tasks, drafting responsibilities, role during deliberation, learning opportunities, relationship with arbitrators, networking and transitioning to being an arbitrator.

The interviewees were inquired to indicate their career trajectory so far and their goals in the future and for those that had transitioned to being an arbitrator or were arbitrators, their experience with working with tribunal secretaries. This broad inquiry was supplemented with questions about nature of tasks, how they were delegated, how they were supervised and the reasons as to delimitation of such tasks, if any. For certain inquiries, hypotheticals and situation questions were put in order to bring out practices, done or likely to be done, when confronted with such a circumstance. During the interviews, the interviewees narrated series of personal experiences in order to explain answers to these questions.

Not all questions were asked to the interviewees. However, each code has a response of atleast ten interviewees. The reason for not asking every question was to enable each interviewee to focus on what they wanted to present in detail. However, certain inquiries, like learning, decision-making, transparency, causes for existence of tribunal secretaries, their drafting responsibilities and role in deliberations were covered in almost all interviews.

The interviews were brought to end when nothing new further was being added and pattern began to emerge to these inquiries. By no means, all questions were answered identically by the interviewees and these divergences are identified in Appendix F as well as in the discussion in the chapters.

#### 3.4.4. CODING THE INTERVIEWS AND THEMATIC ANALYSIS

Block quotations, that is, lifting passages from the interviews, is not followed in this thesis. This is a conscious decision. One implicit advantage being that it adds another layer of anonymization. Without block quotations, it is but a guess as to who maybe the person referred to. But the key reason is to locate patterns as to enunciation of values and description of practices so as to identify routines and meanings. Thus, a codebook framework was adopted to engage with the empirical data obtained through the interviews. Appendices E and F are the interview questions alongside their codes and the codebook.

As discussed in the previous sub-section, literature was extensively consulted in order to develop the codes. As an author, I acknowledge that thesis is written with the knowledge of existing literature. This ensured that the questions were informed by the sensibilities of those

within the ICA community and thus, are understood and appreciated by the interviewees as well as to zoom-in into inquiries that have not been explored in detail.

The codes were developed with this knowledge of the debates but with focus towards answering the research questions of this thesis. The resulting codebook thus has twenty-one unique codes grouped under three themes as well as two additional themes that relies on these codes albeit geared towards meaning specific to these two themes.

The codes correspond to specific phrases or *semantics* and also to meaning connected with those words or *latent* being united conceptually by that core concept. For instance, nearly all interviewees discussed the principle of *intuitu personae* with the semantics of decision-making, proper arbitrator and thus, those segments of the interview were coded as [INTUITU PERSONAE]. An additional consideration to ensure that the codes did represent what they should, the coded segment was checked whether it corresponded to the principle of *intuitu personae* as understood or assumed by the interviewee. Similarly, references to drafting responsibilities included semantics of draft, drafting, summaries, factual, analysis with the meaning being the responsibilities of drafting delegated to the tribunal secretaries and thus, were coded as [DRAFTING]. There were certain divergences in the answers of the respondents and they too were coded similarly provided that the semantics and latent meaning corresponded to the code. For instance, the code [KNOWLEDGE OF THE FILE] was coded through phrases grasp, command, mastering, voice of the record but at the same time, allowed for those interviewees who answered depends on the case on account of the meaning that the code represented. In this case being the knowledge of the arbitral record.

Though, it may appear that use of both semantics and latent meaning might lead to inconsistencies but it was not the case. This is because of the choice of codes that reflected the sensibilities and understanding prevalent within the ICA community. The knowledge of the extant literature enabled developing of a coding scheme that could account for both answers that are patterned and their divergences. Again, for instance, the choice of code [WHY] included references to time, cost, efficiency, aspirations, retention in order to have the shared meaning as to the reasons behind existence of tribunal secretaries and thus, enabling synthesis of differing viewpoints that were bound to arise on account of differing experiences and career trajectories of the interviewees. In other words, the prior consultation of existing literature ensured that the codes developed were capable of accounting for different viewpoints as well as revealing divergences were they appeared. For instance, the code [DELIBERATIONS]

corresponded to attendance and role of tribunal secretaries had during deliberations of the tribunal also elicited divergence of non-attendance by some interviewees. Thus, the coding strategy enables a discussion of patterns where present alongside differing viewpoints as well as divergences.

The codebook framework also had the advantage of making the interviews much more focused. This is so because the questions that were put to the interviewees, whether open-ended or requesting detail or putting hypotheticals, themselves corresponded to specific code. Thus, the interviews were not purely conversational dependent solely on what the interviewee wanted to bring but was designed to assist in moving towards answering the research questions.

Therefore, the interviews are semi-structured, that is, they were not carried out akin to a quantitative questionnaire. The interviewees were enabled to share their experiences so that they were also heard as part of the interview process. The questions were tailored to the interviewee's background while ensuring that the responses could be employed for the purpose of this thesis. This ensured that the eventual output could be used for patterning through identification of commonalities, differences and relationships.<sup>326</sup> This coding of interview questions thus, ensured a fruitful interview as well as ease of coding at the later stage.

The coding was done through two cycles. The first cycle was to ensure that the code was applied to the questions as well as to the segments of the answer. As questions were generally open-ended (except for instance, where a hypothetical specific to a code) and thus, the answers usually involved different codes. The benefit of designing the codes on the basis of knowledge of the debates and conversations within the ICA community meant that these ideas that the interviewees related to each other were also coded so that nothing important or relevant was lost. For instance, inquiries about learning potential associated with the role of tribunal secretary also involved discussion of drafting, transition to being an arbitrator and navigating the role of tribunal secretaries. But as each of these concepts had an individual code, it meant that the respective segments of the answers could also be coded.

Thereafter, a separate code sheet for each interviewee was prepared numbered on the basis of the question with the answer and its segments alongside their codes. The question-based coding was appropriate for semi-structured interviews because questions act as initial labeling and

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<sup>326</sup> JOHNNY SALDAÑA, *supra* note 239. Pg. 98

indexing device in order to access data from a large data sets.<sup>327</sup> The advantage of this approach being that the interview transcripts could be parsed on the basis of the questions. This process, therefore, ensured that the concepts that the interviewees related could be meaningfully analyzed. The discussion in the chapters therefore are not purely summaries of each code but also, a synthesis of related concepts, their patterns and divergences. That is, the results were not simply counted as would be done in quantitative research. That would defeat the purpose and limit the advantages of a semi-structured interview. The answers are indeed grouped according to codes with the goal to locate patterns as well as to present a synthesized picture that corresponds to that particular code.<sup>328</sup>

The second cycle of coding was to group the codes according to themes. A total of five themes were developed with all the codes grouped under three themes while the latter two themes being unique concepts having a distinct meaning utilizing individual coded responses. Themes themselves were not coded because they reflect meaning that bring together what is happening and in turn, allows to detect explanations, causes, consequences and divergences.<sup>329</sup> Thus, the first cycle of coding was labeling and indexing the transcripts and creating code sheets containing the questions and answers labeled with these codes while, the second cycle of coding involved using this source of data to explain the routines and patterns associated with tribunal secretaries as well as to examine their network and relationship with the arbitrators.

Themes are therefore organizing concepts made from individual codes akin to a wall made up of many individual bricks.<sup>330</sup> The difference being that each code indicates one concept whereas themes reflect a central organizing concept that brings together codes, including their relationships with each other. Themes are patterns of shared meaning united by a central organizing concept akin to stories about the data collected through coding.<sup>331</sup> Relying solely on codes would have prevented enunciation of these relationships reducing the codes to mere summaries and also would have failed to draw the links that the interviewees themselves drew between them. For instance, the answers of interviewees with regard to drafting and

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<sup>327</sup> *Id.* Pg. 98 notes that “The sources suggest that Structural Coding is more suitable for interview transcripts than other data such as researcher-generated field notes”

<sup>328</sup> *Id.* Pg. 9

<sup>329</sup> *Id.* Pg. 200

<sup>330</sup> VIRGINIA BRAUN & VICTORIA CLARKE, SUCCESSFUL QUALITATIVE RESEARCH: A PRACTICAL GUIDE FOR BEGINNERS (2013). Pg. 224

<sup>331</sup> Virginia Braun & Victoria Clarke, *One Size Fits All? What Counts as Quality Practice in (Reflexive) Thematic Analysis?*, 18 QUALITATIVE RESEARCH IN PSYCHOLOGY 328 (2021).

deliberations was usually accompanied by reference to the principle of *intuitu personae* and role of direction, supervision and review.

The process of generating themes was an active process, that is, while indeed, themes did emerge from the codes but at the same time, they were crafted to assist in analysis of the data.<sup>332</sup> This led to grouping of codes that were related to each other as well as that assisted in answering the research questions of this thesis. The themes were designed in response to the patterns of coding in a manner that meaningfully presents the responses of the interviews<sup>333</sup> and answer the questions of this research. Additionally, such theming assisted in understanding the larger meaning that in turn allowed for appreciation of values and social identities. The themes thus are analytic outputs developed through coding.

The five themes are ‘Practice of being Tribunal Secretary’, ‘Relationship with the Arbitrators’, ‘Becoming a Tribunal Secretary and Career Navigation’, ‘Ambition’ and ‘Diligence’. The first three themes build on patterning specific codes while the last two themes correspond to specific meanings that the interviewees had.<sup>334</sup> This is because the latter two themes are mindsets, a way of looking at things as opposed to enunciation of values or explanation of practices. By mindset, it is meant their perceptions, views or reasoning that underlie their responses as well as experiences that they have had as opposed to use of specific phrases or words.<sup>335</sup>

#### 3.4.4.1 Theme I: ‘Practice of Being Tribunal Secretary’

The first theme is the practice of being tribunal secretary. As discussed in the previous section<sup>336</sup>, practices are what is actually done repetitively, meaningfully and competently. This therefore meant all tasks that are delegated to the tribunal secretaries as well as how the process of delegation was done. It therefore includes the codes [ADMINISTRATIVE], [KNOWLEDGE OF THE FILE], [DRAFTING], [DELIBERATIONS], [DIRECTION, SUPERVISION & REVISION], [NAVIGATING] and [DIFFERENT RULES & CASES]. The code [INTUITU PERSONAE] though being a value was also discussed by the interviewees in

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<sup>332</sup> VIRGINIA BRAUN AND VICTORIA CLARKE, *supra* note 330. Pg. 225

<sup>333</sup> JOHNNY SALDAÑA, *supra* note 239. Pg. 199 states themes as that “brings meaning and identity to a recurrent [patterned] experience and its variant manifestations. As such, a theme captures and unifies the nature or basis of the experience into a meaningful whole”

<sup>334</sup> Refer Appendix F Codebook for themes and the grouping of codes under each theme.

<sup>335</sup> Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 926 (Peter Cane & Herbert M. Kritzer eds., 1 ed. 2010), <https://academic.oup.com/edited-volume/35077> (last visited Apr 21, 2023).;

<sup>336</sup> Refer Section 3.2.3.

context of their tasks as well as justification of the tasks that were delegated and their manner of delegation. Together they reveal what tribunal secretaries do as their work, what boundaries do they see and how these are justified.

#### 3.4.4.2. Theme II: Relationship with Arbitrators

The second theme explores the relationship that tribunal secretaries have with the arbitrators. This therefore includes those codes that do not correspond to the work and its carrying out but those facets that are necessary for that relationship to function. These include the codes [CHAIR], [FLEXIBILITY], [PRIOR RELATIONSHIP], [TRANSPARENCY], [CHANGING VIEW], [APPOINTMENT], [FORMAL MANDATE] and [REMUNERATION]. All these codes explore one facet of the relationship between the arbitrators and tribunal secretaries. The code [TRANSPARENCY] reflects the concerns about disclosure to the parties of existence of the tribunal secretary and the nature of tasks delegated and is different from [APPOINTMENT] that is about the stage of appointment of tribunal secretary and [FORMAL MANDATE] that is about formal processes of appointing a tribunal secretary. As stated previously, they together lead to the exploration of the relationship between arbitrators and tribunal secretary with each code presenting a particular facet, like a break to a wall.

#### 3.4.4.3. Theme III: Becoming Tribunal Secretary and Career Navigation

The third theme explores the causes behind tribunal secretaries in ICA and navigation of career by the tribunal secretaries. As is also seen in the background of interviewees,<sup>337</sup> ICA practitioners have career paths that involve donning different roles at different points. For instance, fifteen interviewees had acted as tribunal secretary and arbitrator. The third theme therefore organizes the codes in order to explore this process of becoming tribunal secretary as part of their career strategies. This includes the codes [LEARNING BY DOING], [WHY], [CAREER TRAJECTORY], [TRANSITION TO ARBITRATOR], [NETWORKING], [DEMONSTRATION & ACKNOWLEDGMENT] and [INSTITUTIONAL SECRETARIES]. The code [WHY] corresponds to the reasons as to the existence of tribunal secretaries but was included in this theme as opposed to the first theme because it enabled understanding of their role within the larger ICA community. Similarly, the code [LEARNING BY DOING] was included in this theme because of distinct emphasis by respondents as to the consequence of

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<sup>337</sup> Refer Section 3.4.2.1.

becoming a tribunal secretary. Yet given the importance of these two codes, they are referred throughout the thesis including in relation to discussion of duties of tribunal secretaries.

#### 3.4.4.4. Theme IV: Ambition

This theme is not a grouping of codes but rather a standalone theme borrowing from different coded segments that responded to the idea of ambition. The unifying meaning being a reflection on the benefits of being a tribunal secretary in terms of career advantages. This is distinct from the code [LEARNING BY DOING] that corresponds to benefits of learning of ICA and its practice and the code [CAREER TRAJECTORY] that corresponds to the specific career path that the interviewees took. Of course, this theme borrows from the data coded under these two codes but with the sole emphasis to understand aspirations of those acting as or having acted as tribunal secretaries or reflection on this aspiration on the part of tribunal secretaries by the arbitrators. This theme therefore is revelatory of mindset and became an obvious theme after the interviews were conducted on account of its recurrent pattern.

#### 3.4.4.5. Theme V: Diligence

Similar to the theme Ambition, this theme is also not a grouping of codes but a standalone theme. This is again for the reason that this idea of diligence or working hard was a recurrent pattern learnt through interviews revealing the mindset among the arbitrator's expectations and experience of the tribunal secretaries. Thus the unifying meaning being acknowledgment of the need to put in time and effort and seeing the role of tribunal secretary in this manner.

### **3.4.5. JUSTIFICATION FOR INTERVIEWS**

There are two reasons behind adopting semi-structured interviews to conduct the empirical study. The first is that the practices of tribunal secretary and relationship with arbitrators cannot be observed or carried out through fieldwork. Besides the confidentiality reasons that would inhibit such an observation but, even if possible to do so, such fieldwork would present a very narrow and truncated view of the tribunal secretary. Moreover, as ICA proceedings are confidential and private, it is unlikely that a researcher would be permitted to witness an entire proceeding. Even if hypothetically one was to act as a tribunal secretary for one proceeding, it would inevitably require supplementing those observations and findings by speaking to other practitioners. Thus, interviews would still be required so as to avoid findings from one experience to be presented as revelatory of the practices within the ICA community.

The second reason is that quantitative analysis is unlikely to reveal about *what* tribunal secretaries do and *how* they navigate working with arbitrators and their careers. A study like that of Florian Grisel relying on historical data from ICC, Paris would at best turn up names of those appointed as tribunal secretaries without actually shining a light on what it meant to act as tribunal secretary.<sup>338</sup> Moreover, while quantitative surveys do exist and have been relied upon where necessary for this thesis, they answer broad questions as to the awareness of this position as well as attitudes towards appointments, tasks and remunerations.<sup>339</sup> These surveys have their strengths in that they reveal expectations and values that the ICA community as a whole would prefer to uphold but they do not detail the practices that are carried out. For instance, Young ICCA Survey found divergences in response to the questions about same activity when inquired in terms of ‘should do’ versus ‘do in reality’.<sup>340</sup> This is a key limitation of quantitative survey where the nature of questioning as well as eventual answers are unable to bring out details. The Young ICCA Survey, thus, revealed preferences of what tasks that maybe delegated to the tribunal secretaries but, it did not reveal what tasks were actually being done by the tribunal secretaries, how did they do it and how did they engage with arbitrators in doing these tasks.<sup>341</sup> Semi-structured interview has the advantage to go into these details in order to better explore these inquiries.

#### 3.4.6. THEORETICAL CONSIDERATIONS

The empirical study also brought forth relevant considerations of theory. The interviews were conducted in the context of understanding the interviewees’ experience of and with tribunal secretaries. The interviewees were made aware of this purpose when they were invited for interviews.<sup>342</sup> The questions too were prepared with the knowledge of debates and conversations within the ICA community. In this way, the empirical study was designed to contextualize and thus, ensure that interviews are appropriate for the research.

The course of interviews was not a list-based questionnaire as would be the case in a quantitative study even though, a list of questions was always prepared.<sup>343</sup> The interviews were

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<sup>338</sup> Florian Grisel, *supra* note 7.

<sup>339</sup> For instance, YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, *supra* note 322.; Paul Friedland and Stavros Brekoulakis, *supra* note 322.

<sup>340</sup> YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, *supra* note 322.

<sup>341</sup> *Id.*

<sup>342</sup> Appendix A.

<sup>343</sup> Refer Appendix E.

conducted in a manner that were sensitive to the background and the experiences that the interviewees to present wanted to bring. For instance, some interviewees were interested in detailing their career trajectories while there was one interviewee more interested in discussing her experience of historical evolution of role of tribunal secretaries.<sup>344</sup> This ensured that the experiences of individuals was part of the interviews.

This in turn required that the data so gathered through the interviews is trustworthy in that the results generated answer the questions of this thesis. This meant aligning the sensitivity to interviewee's perspective to the purpose of this research. The study of extant literature thus provided for this triangulation of interview data with the meanings extant within the ICA community.<sup>345</sup> For instance, the questions regarding administrative responsibilities meant the tasks that did not relate to the arbitral record but the day to day conduct of arbitration proceedings. The literature, including institutional rules, understood such tasks to be administrative and thus, inquiries and responses received with regard to such tasks were coded as [ADMINISTRATIVE]. This ensured alignment not only of the *semantics*, that is, specific phrases or words but also of meanings associated with the coding. This approach had the advantage of further exploring the practices and experiences that the existing literature did not have, that is, the *hows* of administrative tasks in this case. That is, with regard to the code [ADMINISTRATIVE], it led to exploration of how tribunal secretaries carried out or were expected to carry out such tasks.

An effective triangulation was achieved by developing the codes that were simultaneously aligned with the questions put to the interviewees with the extant literature. This was done by developing questions that corresponded to the codes and then, putting these questions to the interviewees. The answers in turn were coded too, including those segments that corresponded to different codes.

This brought out the relationships, explanations, causes and consequences between the codes as the answers would usually have more than the original code corresponding to the question. Furthermore, when the coding sheets, that is, sheet containing all instances of a particular code were prepared, it enabled identification of pattern within that code as well as relationship of

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<sup>344</sup> Interviewees 3, 5, 17, 20 and 23.

<sup>345</sup> VIRGINIA BRAUN AND VICTORIA CLARKE, *supra* note 330. Pgs. 285-286

that code with other codes. This ensured that all relevant extracts of the interviews were useful for the coding process as well as analysis of data.

Additionally, hypotheticals or detail oriented questions were developed so as to bring out the experience of the interviewees as well as to explore the practices that are actually carried out. For instance, with regard to drafting factual parts of the award, the interviewees were inquired as to how they approached such drafting that in turn, elicited answers of various techniques employed to navigate the record by the tribunal secretaries. Another hypothetical inquired of the tribunal secretaries was whether they would intervene during deliberations in case of error of fact is noticed by them with the purpose to put further details as to how they understood their role and its limitations. This led findings that go beyond the existing literature and contribute further to them through examples and experiences of the interviewees.

It is submitted that such hypotheticals and detail-oriented inquiries would be particularly useful in conducting interviews where fieldwork or observational studies are not possible or practical. This is because in answering these questions, the interviewees either had to rely on their past experience or explain their viewpoint and thus, bring out details that otherwise could not be studied. This is a key advantage that an interview approach has over the quantitative approaches where such detail-oriented questions cannot be put to the respondents. This is apparent in the quantitative surveys concerning tribunal secretaries that solicit responses in terms of *shoulds* or *haves* and thus, able to make a contribution in terms of answering attitudes but are not able to present the practices, that is, what actually occurs and more importantly, how.<sup>346</sup>

This is not to minimize the contribution of the quantitative research already done on tribunal secretaries. Rather, their findings, where necessary, are discussed in this thesis and the development of the questions and coding involved their prior consultation. Quantitative surveys like Young ICCA Survey,<sup>347</sup> QMUL Surveys<sup>348</sup> as well as writings<sup>349</sup> were consulted in order to design the questions and bring into focus key concerns. For instance, the role of

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<sup>346</sup> For instance, YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, *supra* note 322.; Paul Friedland and Stavros Brekoulakis, *supra* note 322.

<sup>347</sup> YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, *supra* note 322.

<sup>348</sup> For instance, Paul Friedland and Stavros Brekoulakis, *supra* note 322.

<sup>349</sup> Illustratively, Constantine Partasides, *supra* note 172.; Michael Polkinghorne and Charles B Rosenberg, *supra* note 16.; Paul Di Pietro, *The ICC's Perspective on the Practice of Administrative Secretaries*, in ARBITRAL SECRETARIES: REPORTS FROM THE JOINT NAI-CEPANI COLLOQUIUM, OCTOBER 5, 2017 101 (Filip De Ly & Luc Demeyere eds., 2018).; Benjamin F. Hughes, *supra* note 11.

tribunal secretary in drafting and deliberations have been constant points of concern and were also incorporated in the interviews.

This two-fold approach of coded questions and coding of answers as well as building codes to correspond to semantics and meanings ensured that coding of the interviews was consistent. However, it meant that mere reference of the word draft didn't mean that it would get coded as [DRAFTING] if it did not correspond to that meaning and similarly, discussion on arbitrator's responsibility to decide was coded as [INTUITU PERSONAE] even if the phrase intuitu personae was not spoken by the interviewee. The coding was done with sensitivity to the interviewee's perspective within the context of how these ideas are understood by the ICA community. However, more often than not, the semantics and the meanings aligned and thus, posed no practical problem in terms of coding. But where such alignment did not occur then, the meaning was prioritized over the semantics. The codebook reflects this approach and its use ensured that the codes were dependable and there would be intracoding reliability.<sup>350</sup>

Thus, this three-fold strategy of coded research questions, coding of answers and combining it with a codebook that engaged with the semantics and the meanings underpinned by ensuring that the meanings of the codes corresponded to how ICA community understands them ensured that there is triangulation and thus, trustworthiness of the coding process. This also acted as a safeguard against developing an analysis based on few vivid anecdotes or examples but instead one that is geared towards saturation in responses while being able to absorb such examples or anecdotes either as convergent or divergent to the pattern.

The adoption of the codebook framework allays the concerns regarding intercoder reliability in as much each code corresponds to one facet.<sup>351</sup> The themes on the other hand are analytic process that was carried out after the coding was completed. Themes themselves were not coded but are identification of meanings and explanations that the patterns revealed.<sup>352</sup>

The first three themes grouped codes around a shared organizational concept<sup>353</sup> that in turn, became the basis for drawing relationships, including, explanations, divergences, causes,

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<sup>350</sup> Intracoder reliability means the consistency of codes across the interview data. Cliodhna O'Connor & Helene Joffe, *Intercoder Reliability in Qualitative Research: Debates and Practical Guidelines*, 19 INTERNATIONAL JOURNAL OF QUALITATIVE METHODS 1 (2020).

<sup>351</sup> Virginia Braun and Victoria Clarke, *supra* note 331.; Cliodhna O'Connor and Helene Joffe, *supra* note 350. Defines intercoder reliability refers to the consistency of coding if done by different people.

<sup>352</sup> JOHNNY SALDAÑA, *supra* note 239. Pg. 200

<sup>353</sup> Virginia Braun and Victoria Clarke, *supra* note 331.

consequences between the codes. In other words, the themes are output of the coding exercise and the discussion in subsequent chapters presents these relationships. The last two themes, ‘Ambition’ and ‘Diligence’ have very specific meanings. Though, they do not have specific codes nested within them but, those particular coded segments that corresponded to this specific meaning were patterned under these themes and thus, so discussed. Through this process of coding and then, developing coding sheets containing all the coded segments from the interviews assisted in locating of patterns as well as divergences and thus, allowing for analytic generalizability.

The final concern is that where interviewees might respond in terms of law of books, formal law, as opposed to law in action, reality of law.<sup>354</sup> The distinction here being speaking of law as it exists in the doctrinaire form as opposed to how it is understood and thus, applied by the practitioners. In other words, here the difficulty is of how to cull out practices, that is, meaningful actions done competently by practitioners as opposed to mere recitation of what interviewees perceive to the formal doctrinaire texts would say.<sup>355</sup>

The interview process therefore specifically adopted incorporation of hypotheticals and detail oriented questions that required the interviewees to answer with reflection or through detail as to how they had acted or would act when faced with the hypothetical. For instance, with regard to the role in deliberations, the interviewees were asked the hypothetical of interrupting deliberations if they noticed a clear factual error among the arbitrators. The response to such inquiries required more than restating the doctrine but rather reflecting on whether they had faced such a situation and if not, how they would engage with it. Similarly, the interviewees that had acted as tribunal secretaries were asked to share how they secured their first appointment and thus, adding detail to how appointments were secured by moving beyond what would the formal rules and institutional regulations state. By use of such practice-oriented questions, the interviews sought to bring to light the realities of law or law in action. Dunoff and Pollack recognize that interviews can bring out details for practices that are difficult to access by researchers.<sup>356</sup> And, by putting such hypotheticals or detail-oriented questions, it is possible to get responses that are result of reflection or prior experience of the interviewees.

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<sup>354</sup> For instance, Matthew Mitchell, *Analyzing the Law Qualitatively*, 23 QRJ 102 (2023).

<sup>355</sup> Refer section 3.2.3 for detailed discussion on practices.

<sup>356</sup> Jeffrey Dunoff and Mark A. Pollack, *supra* note 270.

The upshot being that the answers reflect a relationship with the real world of the tribunal secretaries.

### 3.4.7. SUMMING UP

In sum, the empirical design sought to maximize the benefits from the existing literature in designing the codes that would correspond to the shared meaning within the ICA community. This coding process involved reference to the semantics as well as the meaning with the codebook reflecting this alignment. The questions put to the interviewees also corresponded to each individual code so as to ensure that the responses are useful for this research as well as are sensitive to the meanings within the ICA community.

The interviewees were aware of the purpose of the interview and thus, answered within this context of the research. They were enabled to bring their respective viewpoints as part of the research while at the same time, no opportunity of questioning was wasted on account of prior preparation of questions. The questions were not asked in a list-wise manner but in response to the conversation and what the interviewees intended to share and thus, allowed for exploration of practices with greater detail.

The interviewees include, current and former tribunal secretaries but also, arbitrators, former and current heads of arbitral institutions and former and current institutional secretaries. The background of the interviewees reveal a cross between these different positions with fifteen interviewees having the experience of being both tribunal secretary and arbitrator. The inclusion of arbitrators ensured that the experience corresponding to that of tribunal secretary is part of this study. An effort was made to ensure that there is at least one interviewee from each continent as well as in balance between male and female interviewees.

The interviewees did share personal experiences, examples and anecdotes but the process of coding and later, theming was done to ensure that the patterns are brought out clearly and to also bring out divergences where they exist.

The empirical research is designed to fill in the details of practice of being tribunal secretary within ICA but also, within the larger discussion on international judicial practices.<sup>357</sup> In nutshell, it is designed to bring to fore the practice of being tribunal secretary and how this post is situation within the larger ICA community.

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<sup>357</sup> 1 JEFFREY L DUNOFF AND MARK A POLLACK, *supra* note 13.

### **3.5. JUSTIFICATION FOR MIXED METHOD APPROACH**

As Arthur Danto put it simply, “Not being what it is a picture of is not a defect in pictures, but a necessary condition for something to be a picture at all”.<sup>358</sup> What Danto meant was that study of real world is that the eventual writing is not the real world in itself but akin to a photograph, a snapshot of reality transcribed in a medium. This thesis is written acknowledging that while it is not a tribunal secretary or a practice of being one but it strives to reflect as closely as possible what it means to be one on the basis of evidence.

Towards this end, the approaches adopted are akin to, using the analogy from Julia Galef’s *The Scout Mindset*<sup>359</sup>, map-making. That is, an accuracy motivated reasoning is akin to making map of reality with the goal being that the descriptions and explanations are as close to real world as possible.<sup>360</sup> As a result, the process involves acknowledging what the evidence shows and in turn, informing the writing as a whole on the basis of the evidence.<sup>361</sup>

Therefore, the writing of the thesis meant with engaging with as many sources as possible in order to answer the research questions. This meant engaging with the extant literature, including, the writings of arbitrators as well as tribunal secretaries on the law and sometimes, practice of being tribunal secretary. It included literature on various attempts at regulating their practice along with the study of the rules and guidelines as well as any commentaries discussing their rationale and expectations. It also included interviewing arbitrators, current and former heads of institutions, institutional secretaries and tribunal secretaries. To put it simply, both literature and the empirical study constitute data that has been relied upon to respond to the research questions. The benefit of this broad approach is that of triangulation that enables comparison of different kinds of data from different sources in order to evaluate whether they corroborate each other.<sup>362</sup>

The sociolegal approach adopted in this thesis specifically provides for a multi-method approach where combination of methods is a proper approach towards studying ICA.<sup>363</sup> This

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<sup>358</sup> ARTHUR C. DANTO, NARRATION AND KNOWLEDGE: INCLUDING THE INTEGRAL TEXT OF ANALYTICAL PHILOSOPHY OF HISTORY (2007).

<sup>359</sup> JULIA GALEF, *supra* note 240.

<sup>360</sup> *Id.* Pg. 21

<sup>361</sup> *Id.* Pgs. 58-60

<sup>362</sup> Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT. LAW 1 (2012). Pg. 4

<sup>363</sup> Kaczmarczyk and Lam, *supra* note 243.

means employing different methods in parallel that links actor-centered explanations elicited during empirical research alongside description of institutions that sanction certain practices.<sup>364</sup>

William Twining has made a strong case for combining empirical legal research with the study of doctrinaire law arguing that there are implications of increased transnationalisation.<sup>365</sup> He argued that empirically oriented comparative studies are key to understand legal phenomena associated with globalization.<sup>366</sup> This is because such study of law requires benefit from other disciplines in order to develop understanding of law informed by theory and based on evidence.<sup>367</sup> In a nutshell, he argued specifically for “improved empirical understandings of how legal doctrines, institutions, and practices operate in “the real world””.<sup>368</sup>

The two inquiries of this research necessitates to go beyond the surface law and doctrines. That is, to understand how the law works or law in action, it requires empirical study that integrates the perspectives and experience of its practitioners. This in turn supplements the surface law. For instance, the rules of appointment of tribunal secretary are usually terse and indicate formal requirements that the tribunal has to fulfill prior to the appointment of tribunal secretary. However, this does not reveal on what grounds do arbitrators consider appointing a tribunal secretary in a particular arbitration, how such appointment is navigated between them and finally, the concern of informal or undisclosed secretaries. To answer these questions is to supplement the black letter law of institutional rules with empirical study of social facts as can be gained through the interviews.

Twining has argued that it is too narrow to assume that main subject matters of law are ideas and norms and not empirical study of social facts.<sup>369</sup> Rather he argues that social practices or norms in addition to study of black letter law leads to appreciation of how formal texts are interpreted, adapted or applied.<sup>370</sup> That is, the practice of law requires an empirical engagement.

William Twining makes a strong case that for established transnational fields, like ICA, would require both a comparative engagement with different jurisdictions as well as supplementation

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<sup>364</sup> *Id.* Pg. 722

<sup>365</sup> TWINING, *supra* note 314. Pg. 35

<sup>366</sup> TWINING, *supra* note 307. Pgs. 263-264

<sup>367</sup> *Id.* Pgs. 263-264

<sup>368</sup> TWINING, *supra* note 314. Pg. 37

<sup>369</sup> *Id.* Pg. 39

<sup>370</sup> *Id.* Pg. 44

through an empirical inquiry in order to understand how the law actually works.<sup>371</sup> Nested within this are the inquiries of convergences/divergences of practice of law. The empirical research through pattern-coding and theming attempts to answer these questions that goes beyond what the surface law reveals in order to present the law in action.

It is for these reasons, a mixed method approach, that is, socio-legal combining values, practices and institutions, employs a comparative method and has an empirical component in form of semi-structured interviews, has been adopted for this research. Without this, it would be well-neigh impossible to answer what does it mean to be a tribunal secretary and how does this role fit within the ICA community. By bringing these three approaches, it is possible to explain these practices, including their convergences and divergences as well as to go beyond the black letter of law to describe how tribunal secretaries navigate their work, their relationship with arbitrators and pursue their careers.

### **3.6. LIMITATIONS**

There are three serious limitations of this study. The first limitation is with regard to use of undisclosed or informal tribunal secretaries. This is obvious in as much those who have acted as undisclosed or informal tribunal secretaries do not publicly advertise it as such and thus, are difficult to locate. Moreover, even a quantitative study that has access to appointment records, like the historical data Florian Grisel had access from ICC<sup>372</sup>, is also unlikely to provide any reliable data as to who acted as undisclosed or informal secretary and in how many arbitrations. Thus, while the empirical study did bring some such instances from the interviewees but the same cannot be extrapolated to reflect the experience within the ICA community at large.

The second limitation is a temporal one. That is, the discussion with interviewees took place over 2023-24. Though, inquiries as to change in practice are part of this research and some interviewees did reflect on longer time horizon, but, for most part, this thesis presents contemporaneous practice and view of tribunal secretary spanning no more than the last decade. This is especially so because of the Yukos case that has impacted both the institutions as well as the viewpoint within the ICA community.<sup>373</sup> Therefore, this thesis does not provide

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<sup>371</sup> *Id.*

<sup>372</sup> Florian Grisel, *supra* note 7.

<sup>373</sup> For instance, Egishe Dzhazoyan & Benjamin Burnham, *The Aftermath of the Hague District Court Judgment: Are the Yukos Shareholders Now Shut Out from Enforcing the ECT Awards through the English Courts?*, 1 EUROPEAN INVESTMENT LAW AND ARBITRATION REVIEW (2016).; George A Bermann, *The Yukos Annulment: Answered and Unanswered Questions*, 27 AM. REV. INT'L ARB. 1 (2016).

a historical overview or allows for longitudinal change over decades and reflects the experiences and practices of the last ten or so years. Rather, a historical study would require a very different set of sources, including, the interviewees and then, still would have the limitations of imperfect recall, including, the impact of contemporary practice in reflecting about the past.

The third limitation is zooming-in towards gendered experience within the ICA community. This has been a key concern within the ICA community leading to attempts by arbitral institutions as well as by large law firms towards having more female appointments as arbitrators.<sup>374</sup> Some of the interviewees did reflect on the impact of gender.<sup>375</sup> The thesis strove to have a balance of gender in terms of interviewees with fifteen of the thirty-five interviewees being women. No difference was reported in terms of experience of work but some interviewees had contradictory experiences in terms of career trajectories. These career experiences deserve a doctoral research in their own right. It is therefore, suggested as a future area of research especially, with regard to career trajectories and professional aspirations. Having said so, this distinction does not detract from the broad set of career strategies that are part of this research.

### **3.7. REMARKS ON THE STYLE OF WRITING**

Before ending this chapter, some remarks on the style of writing adopted in this thesis is in order. First, this thesis is a collaboration between myself, that is the author and, the reader. It means that there are ideas and facts that I seek to present to the reader while acknowledging that the reader may have a differing lens or purpose behind consulting this work. The choice of impersonal language is, therefore, a stylistic choice to present with as much precision as possible the ideas I have, while acknowledging that the reader may have differing purpose from myself.

Second, the choice of the language also reflects on the engagement with the question of “what is the right thing to do” or normative preference for adoption as a policy. The thesis is primarily a descriptive study of what it means to be a tribunal secretary and how does this position fits

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<sup>374</sup> For instance, ICCA 2014. Does “Male, Pale, and Stale” Threaten the Legitimacy of International Arbitration? Perhaps, but There’s No Clear Path to Change, <https://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-does-male-pale-and-stale-threaten-the-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/> (last visited May 23, 2024).; Equal Representation in Arbitration Pledge, <https://www.arbitrationpledge.com/> (last visited May 23, 2024).; DIVERSITY IN INTERNATIONAL ARBITRATION: WHY IT MATTERS AND HOW TO SUSTAIN IT, (Shahla F. Ali et al. eds., 2022).

<sup>375</sup> Interviewees 21 and 22.

within the ICA community. Therefore, though some recommendations are indeed given in the concluding chapter, the thesis as a whole adopts the perspective of what is termed as “science arbiters”, that is, those that respond to questions without recommendations on fixing issues.<sup>376</sup> Thus, the style of language throughout the thesis is one that strives to describe and explain as opposed to prescribe or evaluate norms.

### **3.8. SUMMING UP**

This chapter details the methodologies and the design of the empirical study adopted in this thesis. In effect, it is the axle and wheels of the wagon. This research embraces a mixed method approach to answer the two research questions of this thesis. This is so because merely relying on black letter law does not lead to appreciation of how the law works in practice. This means that the black letter law is studied and is specifically, one of the three components of the sociolegal method adopted. But it is supplemented by also studying the values and the practices within the ICA community. This means to bring to fore what guiding principles or ideas that the practitioners articulate and what repetitive actions are carried out meaningfully and competently. This makes the triad of *values*, *practices* and *institutions*.

In order to study this, especially the values and practices, an empirical study through semi-structured interviews was conducted. A total of thirty-five interviews were conducted that brought together practitioners with wide range of background, experience and geographies. A total of twenty-three respondents had experience as tribunal secretaries with fifteen of them having experience as both a tribunal secretary and an arbitrator. Additionally, perspectives of arbitrators, institutional heads and institutional secretaries was also sought through the interviews in order to be able to present a more fuller picture of the tasks and career trajectories that the members of ICA community undertake.

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<sup>376</sup> MARTIN W. ANGLER, *supra* note 240. Pg 19

## CHAPTER FOUR

### DEFINING THE PROTAGONIST: THE TRIBUNAL SECRETARY

“The term [tribunal secretaries] must also be understood in the broadest sense as encompassing all of different types of assistants that arbitrators turn to. .... The secretary to the arbitral tribunal ... the assistant to the president .... The assistant to a co-arbitrator”<sup>377</sup>

“any assistance to an arbitrator, beyond the services of a professional secretary (such as word processing, calendaring, or making travel and other logistical arrangements), should be treated in the same manner as a tribunal secretary in terms of disclosure to, and consent of, the parties.”<sup>378</sup>

#### 4.1. INTRODUCTION

This is a definitional chapter. That is, here the term tribunal secretary is defined for the purpose of this thesis. The definition is geared towards incorporating the institutions that exist under various institutional rules as well as supplementing them with the practices within the ICA community. This is necessary to present a more holistic picture of who is a tribunal secretary and benefiting from the experiences and understandings of the interviewees.

This is done by adopting a three-pronged approach. First, a functional criteria is employed by studying different forms of third-party assistance that is available to the tribunal in order to identify what a tribunal secretary does and more importantly, does not do. Second, the institutional rules are studied to present common threads in order to identify widely used understanding of tribunal secretary. Third, the concerns regarding informal reliance and undisclosed reliance are specifically incorporated in view of the experiences shared by the ICA community in their writings.

The chapter, commences with the discussion on different types of assistance that are available to arbitral tribunal. By presenting various actors and their specific roles within the arbitral

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<sup>377</sup> Pierre Tercier, *supra* note 9.

<sup>378</sup> Benjamin F. Hughes, *supra* note 11.

proceedings, it enables for more careful delineation of duties performed by tribunal secretary. A clear outcome being to also identify what the tribunal secretary does not do.

The next section presents the different institutional rules that provide the legal basis for appointment of tribunal secretary. This allows also to map the current state of rules and thereby, presenting the institutions of tribunal secretary as exemplified in these rules.

Thereafter, a brief discussion on informal and undisclosed secretarial support is presented to be able to incorporate this concern as well as such experience that the empirical study may find.

The chapter concludes with a synthesized definition for tribunal secretary for the purpose of this research. The reasons for adopting this definition are discussed alongside the definition.

## **4.2. THE NEED FOR DEFINITION**

The opening quotations both reveal and obscure tribunal secretary as an actor in ICA.<sup>379</sup> ICA proceedings involve multiple forms of assistance that the tribunal calls upon or receives.<sup>380</sup> As a result, the proceedings involve more than the parties and the tribunal. Therefore, a definition of tribunal secretary must differentiate tribunal secretary from these other forms of assistance and actors.

Additionally, a definition is necessary to understand this post within the ICA community, including its function in terms of its duties and tasks.<sup>381</sup> From this, it follows that this thesis responds to what people do in patterned and competent manner being the practices of performing their duties and values shared within the ICA community.<sup>382</sup> As discussed in Chapter 3, restricting the study to surface law leads to an incomplete understanding of its

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<sup>379</sup> Pierre Tercier, *supra* note 9; Benjamin F. Hughes, *supra* note 11.

<sup>380</sup> For instance, UNCITRAL Model Law specifically provides in Article 26 that, “Unless otherwise agreed by the parties, the arbitral tribunal

- (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
- (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.”

<sup>381</sup> Kaczmarczyk and Lam, *supra* note 81; TWINING, *supra* note 78; WILLIAM TWINING, GLOBALISATION AND LEGAL SCHOLARSHIP (2011).

<sup>382</sup> Refer Section 3.2.3. of Chapter 3 for detailed discussion on practices and Section 3.2.2. for detailed discussion on values. More specifically, Kaczmarczyk and Lam, *supra* note 81. Pg. 717; Jeffrey Dunoff and Mark A. Pollack, *supra* note 270. Pg. 257

practice.<sup>383</sup> While the study of institutional rules and case laws is important as they reveal institutionalized sanction and enforcement, yet, in and of itself they do not reveal its practice.<sup>384</sup>

Therefore, this research has adopted a multi-method approach to study the habits formed in professional relationships, shared assumptions and respond to concern of undisclosed secretarial support<sup>385</sup>. Therefore, it is imperative to have a definition of tribunal secretary that factors values, practices and institutions associated with it.<sup>386</sup> As a preliminary, it is therefore necessary to map out different forms of assistance that a tribunal may receive during the course of arbitration. This in turn leads to a definition being more pointed being informed by what it is as much as what it is not. As a result, it sifts those who fulfill the duties associated with a tribunal secretary, even if they do not have this precise title, while excluding those who may have held this title ceremonially or formally, but do not discharge the role or duties of one.

This means an engagement with the shared values and institutions of the ICA community in the writings of its practitioners as well as guidelines or specific rules set by IACs.<sup>387</sup> Though, the actual practice of duties and tasks are explored in subsequent chapters, the overview of these rules and guidelines culls-out the shared commonalities or *tronc commun* between these guidelines even though after over three decades of debate, a uniform standard is yet out of reach.<sup>388</sup> Thus, the study of rules and guidelines, most of which are termed “soft law” within

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<sup>383</sup> Refer Chapter 3 for detailed discussion on sociolegal research and comparative method as research methodologies adopted for this thesis.

<sup>384</sup> Refer Section 3.2. of Chapter 3.; TWINING, *supra* note 78. Pg. 322

<sup>385</sup> For instance, refer, Benjamin F. Hughes, *supra* note 11; Olufunke Adekoya, *supra* note 11. Also for broader discussion, Jeffrey Dunoff and Mark Pollack, *supra* note 12.

<sup>386</sup> Refer Section 3.2. of Chapter 3 for fuller discussion on values, practices and institutions.; More specifically, refer, Kaczmarczyk and Lam, *supra* note 81.

<sup>387</sup> JOSHUA KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW (First edition ed. 2013); Bianchi, *supra* note 148.

<sup>388</sup> For instance, Michael Polkinghorne & Charles B Rosenberg, *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*, 8 DISP. RESOL. INT'L 107 (2014). Argued as far back as 2014 for need as well as ease of having common standards; J. Ole Jensen, *Secretaries to Arbitral Tribunals: Judicial Assistants Rooted in Party Autonomy*, 11 INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 17 (2020). Has argued for traffic light scale of duties so as to enable greater clarity and control over the duties; YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, 1 (2014), [https://cdn.arbitration-icca.org/s3fs-public/document/media\\_document/aa\\_arbitral\\_sec\\_guide\\_composite\\_10\\_feb\\_2015.pdf](https://cdn.arbitration-icca.org/s3fs-public/document/media_document/aa_arbitral_sec_guide_composite_10_feb_2015.pdf) (last visited Apr 17, 2023). Has also proposed best practices. However, Benjamin F. Hughes, *supra* note 11. Recognizes that a single overarching definition in terms of duties is yet out of reach; Olufunke Adekoya, *supra* note 11. Similarly recognized absence of uniform principles between different institutional guidelines; Felix Dasser and Emmanuel O. Igbokwe, *supra* note 175. Deplore lack of clarity and recognize difficulty in having global standard.

the literature but lack normativity beyond the IACs that have issued them identifies these commonalities or *tronc commun* associated with tribunal secretaries.<sup>389</sup>

Thus, this chapter's purpose is to develop usable definition of tribunal secretary based on the functions as well as in their relationship with the arbitration proceedings and tribunal. This starts grounds the definition so subsequent chapters can engage with the issues associated with this post. Additionally, by developing such definition, this research engages with the practice within the ICA community that exists in different geographies and is thus, transnational. In short, the purpose being to have a definition that is able to go beyond the surface of texts and doctrines.<sup>390</sup>

To sum up, a definition is necessary in order to ensure that there is uniformity throughout the thesis when discussing its role within the ICA community alongside its values, practices and institutions. Such a definition therefore leads to assessment of the experience of the practitioners that are interviewed as part of this study as well as to engage with the literature that is no longer restricted to a geography or a small set of elite practitioners.<sup>391</sup>

### **4.3. DIFFERENT TYPES OF ASSISTANCE**

This section introduces different types of assistance that are received by an arbitral tribunal. The purpose of this section is to present an overview of multiple forms of third-party assistance that is available in arbitration. As discussed in the previous section, this in turn leads to developing a criterion through which tribunal secretary can be distinguished from other assistance that a tribunal receives.

The Model Law<sup>392</sup> and a number of national legislations have provided for the tribunal's right to appoint an expert to assist the tribunal.<sup>393</sup> For instance, this is reflected in Section 37 of the

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<sup>389</sup> FELIX DASSER, *supra* note 279. Discussed in chapter 2 and the argument of lack of normativity associated with many guidelines and best practices within ICA; Filip De Ly, *supra* note 211. For detailed discussion on lack of consensus between institutional rules.; Joshua Karton, *International Arbitration as Comparative Law in Action*, J. DISP. RESOL. 293 (2020).

<sup>390</sup> TWINING, *supra* note 381. Pgs 45-62 {Cover the distinction in the Methodology of surface law and law in action as part of holistic/wholesome understanding of law.}

<sup>391</sup> Emmanuel Gaillard, *supra* note 69.

<sup>392</sup> UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006*, [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-0955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-0955_e_ebook.pdf) (last visited Jun 8, 2024). Article 26; ILIAS BANTEKAS ET AL., *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY* (1 ed. 2020), <https://www.cambridge.org/core/product/identifier/9781108633376/type/book> (last visited Mar 6, 2023). Pg 697-698;

<sup>393</sup> English arbitration Act 1996 section 37(1)(a); Swedish Arbitration Act 1999 s. 25(1)

1996 English Arbitration Act and Section 25(1) of the Swedish Arbitration Act, 1999. Additionally, provisions for the parties to appoint their own experts can be found in more recent national arbitration laws of Spain and Austria, as well as in a number of institutional rules such as the ICC Rules and the AAA Rules.<sup>394</sup>

#### 4.3.1. ASSISTANCE THAT BECOMES PART OF THE RECORD OF THE ARBITRATION

The first type of assistance is that contributes to the record of the arbitration. This form of assistance may be relied upon explicitly in the orders or the award made by the tribunal. This includes experts who provide specialized knowledge or expertise to assist in resolving the dispute.

UNCITRAL Model Law specifically provides for appointment of experts to assist the tribunal.<sup>395</sup> The key thrust being to provide for assistance to ensure an enforceable award, to the extent, that the award so rendered benefits from the necessary technical expertise that the arbitrators may not possess themselves. Typically, this includes, legal experts, technical experts, and financial/accounting experts.<sup>396</sup> They provide assistance by presenting necessary and relevant information for the tribunal to make informed decisions.

Gabrielle Kaufmann-Kohler in her discussion about working with laws of multiple jurisdictions has sought to answer this dilemma of when it is appropriate to seek expert assistance on legal issues.<sup>397</sup> She argues that if the law must be proven, an opinion by a legal expert should be filed and, if applicable, the expert can offer oral testimony. She further highlights that in cases involving unsettled issue of law, legal evidence may be provided, especially if it is given by someone whose authority the arbitrators recognize. However, Bantekas et al. comment that presently there appears to be inconsistent dicta from different Courts as to whether there exists an obligation on the tribunal to seek expert assistance in case of technical issues.<sup>398</sup>

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<sup>394</sup> For instance, International Chamber of Commerce, *ICC 2021 Arbitration Rules*, (2021), <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> (last visited Jun 8, 2024). Article 25

<sup>395</sup> UNCITRAL, *supra* note 392. Article 26

<sup>396</sup> BANTEKAS ET AL., *supra* note 392.

<sup>397</sup> Gabrielle Kaufmann-Kohler, *The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions*, 21 ARBITRATION INTERNATIONAL 631 (2005). Pg. 637

<sup>398</sup> BANTEKAS ET AL., *supra* note 392.

The IBA Rules provide a clear and concise frame for taking of evidence which has become a standard approach in international arbitration.<sup>399</sup> The Prague Rules, influenced by the continental civil law procedure, favour the use of tribunal-appointed experts<sup>400</sup>, while the CIArb Guideline is a set of guidelines focusing on the use of party-appointed and tribunal-appointed experts<sup>401</sup>. The CIArb Protocol is intended to govern the preparation and giving of party-appointed expert evidence.<sup>402</sup>

In a nutshell, the rules lay down rules for appointing a tribunal expert requiring that the arbitrators consult the parties as to who the expert should be and their terms of reference.<sup>403</sup> For instance, ICC Rules require that the expert's terms of reference define the precise technical questions to be answered in the report, which then serves as a form of evidence.<sup>404</sup> The key point for this discussion is that the assistance of tribunal appointed expert exists explicitly to inform decision-making and becomes part of the arbitration record.

Another form of third-party assistance to the tribunal are the party appointed-experts or expert-witnesses. The parties choose them in order to provide assistance to the tribunal based on their qualifications, experience, reputation, and previous stances on similar issues that are compatible with the views of the selecting party. Like the tribunal appointed experts, they are expected to offer technical and scientific matters that may be referred by the tribunal as part of their decision-making. This is because the parties' rely on them to substantiate technical or legal matters. This is especially true when the expert's opinion concerns questions of law, such as legal systems with which the arbitrators may not be familiar.<sup>405</sup>

In sum, both these experts add to the arbitration record, may be subjected to cross-examination as part of the proceedings and this cross-examination too becomes part of the record. Moreover,

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<sup>399</sup> International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b> (last visited Jun 8, 2024). Article 5 and 8

<sup>400</sup> Prague Rules, <https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf> (last visited Jun 8, 2024). Article 6

<sup>401</sup> Chartered Institute of Arbitrators, *Party-Appointed and Tribunal Appointed Experts*, <https://www.ciarb.org/media/zvijl3kx/7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf> (last visited Jun 8, 2024). Article 3

<sup>402</sup> *Id.*

<sup>403</sup> Prague Rules, *supra* note 400. Article 6

<sup>404</sup> International Chamber of Commerce, *supra* note 394.

<sup>405</sup> MICHAEL E SCHNEIDER, TECHNICAL EXPERTS IN INTERNATIONAL ARBITRATION: INTRODUCTORY COMMENTS TO THE MATERIALS FROM ARBITRATION PRACTICE (1993); G. Kaufmann-Kohler, *The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions*, 21 ARBITRATION INTERNATIONAL 631 (2005).

the parties and the tribunal may rely on their submissions to advance their case or decide the dispute.

#### 4.3.2. ASSISTANCE THAT INFLUENCES THE CONTENT OF THE RECORD

Another form of assistance is where the tribunal determines that an external expert is required to review the documents to determine question of confidentiality and thus, deciding what becomes part of the record. This expert assistance becomes necessary where there are confidentiality issues, that is, where the parties' assert that the tribunal would be unable to view the proceedings fairly after viewing the documents even, if the documents are finally rejected.<sup>406</sup> In simple words, it is the problem of absence of 'delete key', that is, tribunal may not be able to simply be empty of the contents of the documents even after rejecting them to be part of the record.<sup>407</sup>

Document Product Master has been suggested as a solution to such situation.<sup>408</sup> They are expected to assist the tribunal in the fact-finding process by assisting with the review of documents and providing advice on relevance and legal privilege. As a procedure, it requires that an agreement is reached to the confidentiality obligations of the Document Production Master as well as the process of review of documents ensuring that the documents so produced are selected and sanitized to maintain confidentiality obligations.<sup>409</sup>

However, due to the evaluative nature of their duties, that are usually reserved for the tribunal, some have questioned the legitimacy of such appointments.<sup>410</sup> Yet, it has been argued that this delegation to review documents for their relevance and confidentiality, it assists the tribunal to act with impartiality and objectivity with respect to document production requests.<sup>411</sup>

#### 4.3.3. ASSISTANCE THAT IS PURELY LOGISTICAL AND PERIPHERAL

While the three forms of assistance, tribunal-appointed expert, party-appointed expert and document-production master, directly influence the content of the record, this fourth type of

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<sup>406</sup> JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION (2012). Pg. 877

<sup>407</sup> Hans van Houtte, *The Use of an Expert to Handle Document Production: IBA Rules on the Taking of Evidence (Art. 3(7))*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 622 (Albert Jan van den Berg ed., 2007).

<sup>408</sup> INSIDE THE BLACK BOX, *supra* note 124. pgs 83-84

<sup>409</sup> *Id.* Pg. 84; JENSEN, *supra* note 149. Para 1.14

<sup>410</sup> FRÉDÉRIC GILLES SOURGENS, KABIR DUGGAL, & IAN A. LAIRD, EVIDENCE IN INTERNATIONAL INVESTMENT ARBITRATION (First edition ed. 2018). Para 9.53.

<sup>411</sup> JENSEN, *supra* note 149. At para 1.14 for detailed discussion.

assistance pertains to those types of assistance that are purely logistical and peripheral. This form of assistance is not dependent on a particular person, that is, it is easily dispensable and replaceable by another person. These include tasks like, booking the venue, ensuring that multimedia devices are functioning properly, managing the logistical needs of the room as well as handling the printing and videography needs of the proceedings.

This assistance is that of court reporters, translators, interpreters, videographers, office secretaries, and personal assistants who all provide assistance in an arbitration, carrying out tasks of an administrative or logistical in nature such as helping in the recording proceedings, providing transcripts, and preserving evidence.<sup>412</sup>

Such assistance is peripheral to the proceedings, that is, these tasks can be performed by anyone, including the tribunal secretaries<sup>413</sup> or personal secretaries of the arbitrators or parties themselves<sup>414</sup>. The person performing these tasks are dispensable, that is, these tasks are not unique and can be handled by different persons during the course of the proceedings. They do not directly contribute to the record of the proceedings and the material (for instance, transcripts or time-keeping) generated is merely clerical not originating from them but, being record of the parties or the proceedings.

#### 4.3.4 SUMMING UP

The four types of third-party assistance to tribunal discussed above exists due to the practical needs of both the tribunal and the parties involved. Tribunal-appointed experts provide the tribunal with knowledge and expertise it may not possess, while party-appointed experts offer the parties an avenue to present their perspective to the tribunal. A document production master assists the tribunal in managing large volumes of documents and especially the concerns around confidentiality. Institutional support through logistical staff focuses on making sure the proceedings get underway, but, their role is mainly restricted to peripheral tasks, without the same level of record-contribution as a tribunal-appointed or party-appointed expert. Each of these actors has a specific role in the arbitral process, and understanding their scope and limitations becomes necessary to focus on the unique role of Tribunal Secretary.

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<sup>412</sup> *Id.* At page 24, para 1.30

<sup>413</sup> *Id.* At pages 24-25, para 1.30

<sup>414</sup> For detailed discussion, SG VYAP-IAMC HYDERABAD WEBINAR: TRIBUNAL SECRETARIES DEMYSTIFIED, (2023), <https://www.youtube.com/watch?v=gQ8NdBqMMhg> (last visited Dec 24, 2023).

What can be surmised from the preceding discussion is that the tribunal secretary does not contribute to the content of the record of the proceedings nor has the powers to decide what constitutes the record. Neither is his contribution done with the goal of assisting parties in their submissions or for reliance by the tribunal to decide the dispute. He is moreover not subject to cross-examination.

A tribunal secretary may carry out peripheral tasks like taking minutes, arranging the logistics of the venue, time-keeping, transcription etc. but his tasks are not limited to such duties. It may be the case that is all that is expected of the tribunal secretary but as is discussed in the next chapters, even the most conservative approaches allow for role that is more than logistical duties.

Finally, tribunal secretaries may be appointed for the entirety of the proceedings and not for one particular task or stage of the arbitration unlike the experts or logistical support that are confined to a particular stage of the proceedings.

#### **4.4. THE MANY FACETS OF TRIBUNAL SECRETARY**

By examining the four prominent types of third-party support to an arbitral tribunal, it becomes possible to focus the role of the Tribunal Secretary. This section opens with the discussion on various terms used to describe this role before explaining the reason for adopting the term “Tribunal Secretary” for this research.

This section then canvasses the rules, regulations and guidelines made by different institutions in order to identify *tronc commun* for purpose of defining tribunal secretary for this research.<sup>415</sup> This analysis is that of comparative method that allows to identify what content of rules and laws are widely supported.<sup>416</sup> Comparative approach is intrinsic to the practice of ICA itself as being employed by the practitioners to analyze and develop responses to the problems they confront.<sup>417</sup> The other advantage is that to locate patterns that have developed in by leading IACs.<sup>418</sup>

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<sup>415</sup> Karton, *supra* note 389. Pg. 302

<sup>416</sup> Emmanuel Gaillard, *supra* note 296. Pg. 66; TWINING, *supra* note 381. to employ comparative approach while avoiding a naïve comparison; .; For instance, the assessment of duties of Tribunal Secretaries through comparison of different institutional rules Filip De Ly, *supra* note 211. And Olufunke Adekoya, *supra* note 11.

<sup>417</sup> JEMIELNIAK, *supra* note 22.; Refer TWINING, *supra* note 78. Pgs, 244-251; Joanna Jemielniak, *Comparative Analysis as an Autonomization Strategy in International Commercial Arbitration*, 31 INT J SEMIOT LAW 155 (2018). Pgs 162-164

<sup>418</sup> Refer Section 3.3. in Chapter 3 for detailed discussion.

#### 4.4.1. DIFFERENT COMPETING TERMINOLOGIES

The first challenge in the study of the role of tribunal secretaries is a lack of standardization of the term. Ole Jensen in his legal treatise has argued for the adoption of the term "Tribunal Secretary" for purpose of uniformity because of wide variety of titles used for this position.<sup>419</sup> He counted at least twenty other terms besides tribunal secretary that have been used in the literature to describe this role and thus, presenting the problem of consistency in terminology.<sup>420</sup> In this examination for the appropriate terminology for individuals who support arbitrators, the terms "clerk" and "registrar" were found to be too close to judicial assistants in domestic Courts. He further argued that term "assistant" was deemed too generic, while "assistant to the tribunal" is already used to distinguish institutional tribunal secretaries from those appointed by the arbitral tribunal. Therefore, he argued that the term "Tribunal Secretary" is most appropriate because of being grounded in its reflection of the role and distinguishing it from the other actors that carry out logistical and administrative tasks, including the ones associated with the IACs.<sup>421</sup>

Also multiple surveys conducted in the last decade have used the term tribunal secretary in relation to their duties.<sup>422</sup> For instance, 2015 QMUL survey found that 97% of participants were of the function and role of the tribunal secretaries with over 80% of participant having witnessed them in practice.<sup>423</sup> This was again witnessed in the 2018 QMUL survey when 70% of the participants called for greater regulation of their practice and thus, again implicitly demonstrating knowledge and identification of the term tribunal secretaries.<sup>424</sup>

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<sup>419</sup> JENSEN, *supra* note 149. paragraphs 1.36 to 1.41

<sup>420</sup> J. Ole Jensen, *Secretaries to Arbitral Tribunals: Judicial Assistants Rooted in Party Autonomy*, 11 INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 17 (2020).paragraph 1.36 Its names include administrative secretary, administrator, arbitral clerk, arbitral secretary, the arbitrators' secretary, (legal) assistant to the tribunal, assistant, clerk, law or legal clerk, law secretary to the tribunal, legal adviser, paralegal, rapporteur, registrar, tribunal registrar, scribe, secretary assistant, secretary of the arbitral tribunal, secretary to the arbitral tribunal, tribunal-appointed secretary, and tribunal secretary.

<sup>421</sup> JENSEN, *supra* note 149. Paras 1.36-1.41

<sup>422</sup> Research based report on the use of tribunal secretaries in international commercial arbitration, (2015), <https://www.bclplaw.com/a/web/147226/BLP-International-Arbitration-Survey-2015.pdf> (last visited Apr 19, 2023).; Paul Friedland and Stavros Brekoulakis, *supra* note 322.; Paul Friedland and Loukas Mistelis, *supra* note 115.; Paul Friedland and Stavros Brekoulakis, *supra* note 115.

<sup>423</sup> Paul Friedland and Loukas Mistelis, *supra* note 115. Pg. 46

<sup>424</sup> Paul Friedland and Stavros Brekoulakis, *supra* note 115. Pg. 33

This is reflected in the writings of ICA community as well with substantial usage of the term tribunal secretary, though, not to the same extent of uniformity as ‘arbitrators’ or ‘parties’.<sup>425</sup> This is especially true in view of the Yukos decision that led to flurry of writings on tribunal secretaries.<sup>426</sup>

The term tribunal secretary may not have started out in ICA as a term of art. But increasingly, in the last decade or so, its usage has gained prominence and is understood to refer to a specific actor within the ICA proceedings. Therefore, this research uses the term ‘Tribunal Secretary’ when referring to this position. It is for the reasons of consistency within the thesis but also, an acknowledgment of its usage within the ICA community.

#### 4.4.2 LEGAL BASIS IN FOUR JURISDICTIONS

Thus, having canvassed the role of four leading forms of assistance available to the tribunal, the next step is to examine the legal basis and qualifications put in place by the four leading jurisdictions. With an exception of ICC, most of the institutional rules and guidelines have developed in the last decade or so alongside best practices and guidelines.<sup>427</sup> Thus, in this section, the common threads are discussed in order to supplement the functional criteria discussed in the preceding section. Here, the focus is on the criterion laid down by IACs for tribunal secretaries and their relationship with secretaries of those institutions.

In order to analyze this, it is necessary to have regard to the nature of legal interpretation in ICA. As discussed in Chapter 3, the doctrines and jurisprudence of ICA has been argued as a comparative law in action.<sup>428</sup> The legal interpretation of ICA is distinct from domestic law, due

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<sup>425</sup> C. Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARBITRATION INTERNATIONAL 147 (2002).; Doug Jones, *ETHICAL IMPLICATIONS OF USING PARALEGALS AND TRIBUNAL SECRETARIES*.; Jensen, *supra* note 420.; Sarah Grimmer, *The HKIAC Tribunal Secretary Service: Four Years On*, 20 ASIAN DISP. REV. 160 (2018).; Joan Sherer, *The Iran-United States Claims Tribunal and the Process of International Claims Restitution*. Edited by David D. Caron and John R. Crook. Ardsley, New York: Transnational Publishers, Inc., 2000. Pp. ix, 509. ISBN 1-57105-113-9. US\$125.00., 29 INT. J. OF LEGAL INF. 651 (2001).; Polkinghorne and Rosenberg, *supra* note 388.

<sup>426</sup> George A Bermann, *The Yukos Annulment: Answered and Unanswered Questions*, 27 AM. REV. INT’L ARB. 1 (2016).; Chloe J Carswell & Lucy Winnington-Ingram, *Awards: Challenges Based on Misuse of Tribunal Secretaries*, (2021), <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/awards-challenges-based-misuse-of-tribunal-secretaries> (last visited Apr 19, 2023).; Omar Puertas & Borja Alvarez, *The Yukos Appeal Decision on the Role of Arbitral Tribunal’s Secretaries*, <https://www.ibanet.org/article/B55CB7F1-01C6-4BDF-9383-90F567C17147>.; Lawrence W. Newman & David Zaslawsky, *The Yukos Case: More on the Fourth Arbitrator*, (2015), [http://pdr.uni-koeln.de/uploads/Newman\\_Zaslawsky\\_2015\\_The Yukos Case.pdf](http://pdr.uni-koeln.de/uploads/Newman_Zaslawsky_2015_The Yukos Case.pdf) (last visited Jun 7, 2024).

<sup>427</sup> For instance, YOUNG ICCA GUIDE, *supra* note 388.

<sup>428</sup> Refer Section 3.3. of Chapter 3 for detailed discussion.: More specifically, JEMIELNIAK, *supra* note 42.; Karton, *supra* note 389.

to its practitioners' practice of employing multiple sources of law.<sup>429</sup> Thus, comparative analysis enjoys a unique place in the practice of ICA being employed both as an advocacy tool and as part of decision-making.<sup>430</sup>

#### 4.4.2.1. ICC, Paris

In 1995, the International Chamber of Commerce [ICC] issued one of the earliest guidance concerning the use of secretaries in arbitral tribunals.<sup>431</sup> This guidance issued under the heading 'Non-delegation of Duties' led to serious debate with a leading arbitrator, Pierre Lalive and was as a result quickly rendered obsolete.<sup>432</sup> This was revised in 2012 through the 'Note on the Appointment, Duties and Remuneration of Administrative Secretaries'.<sup>433</sup> Subsequently, the ICC has further updated its guidance, which is now included in the 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' in 2021.<sup>434</sup>

Thus, ICC requires that the tribunal must ensure that the tribunal secretaries meet the same independence and impartiality requirements as them.<sup>435</sup> It also prohibits the members of the secretariat of ICC to serve this role.<sup>436</sup> The recommended procedure for the appointment of tribunal secretaries requires that the tribunal secures the parties' consent by sharing the proposed tribunal secretary's CV, Declaration of Independence and Impartiality, and undertakings to abide by the ICC guidelines prior to the appointment.<sup>437</sup> It permits that the

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<sup>429</sup> Refer Section 3.3. of Chapter 3 for detailed discussion.; More specifically, Joanna Lam, *supra* note 289.

<sup>430</sup> Emmanuel Gaillard, *supra* note 296.; Joanna Lam, *supra* note 289.

<sup>431</sup> Eric Schwartz, *supra* note 322. Pgs. 86-87

<sup>432</sup> Refer Chapter 5 for the detailed discussion of this debate. More specifically refer, *Id.*; Pierre Lalive, *supra* note 9.; Pierre Lalive, *supra* note 9.; For reference to being rendered obsolete, Partasides, *supra* note 425.; Paul Di Pietro, *supra* note 349.

<sup>433</sup> International Chamber of Commerce, *Note on the Appointment, Duties and Remuneration of Administrative Secretaries*, (2012), [https://www.josemigueljudice-arbitration.com/xms/files/02\\_TEXTOS\\_ARBITRAGEM/20\\_Gestao\\_Processual/ICC\\_-\\_Note\\_on\\_Administrative\\_Secretaries.pdf](https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/20_Gestao_Processual/ICC_-_Note_on_Administrative_Secretaries.pdf) (last visited Apr 18, 2023).

<sup>434</sup> International Chamber of Commerce, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, (2021), <https://www.iccspain.org/wp-content/uploads/2021/01/2021-icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021-1.pdf> (last visited Apr 18, 2023).

<sup>435</sup> *Id.* Para 219

<sup>436</sup> *Id.* Para 219

<sup>437</sup> *Id.* Para 220

secretary is appointed at any stage of the proceedings.<sup>438</sup> Furthermore, the tribunal is prohibited from delegating any decision-making function to the tribunal secretary.<sup>439</sup>

With regard to remuneration, ICC imposes strict conditions on the tribunal with the requirement that such services do not incur additional financial burden on the parties and that such remuneration be paid out of from the fees of all arbitrators.<sup>440</sup> Though, the tribunal is permitted to seek disbursement for justified reasonable activities like expenses for hearings and meetings.<sup>441</sup>

To sum up, ICC recognizes utility of services rendered by secretaries by laying down criteria for their appointment and remuneration.

#### 4.4.2.2. SIAC, Singapore

Singapore International Arbitration Centre [hereinafter, SIAC] has also released Practice Note that regulates the appointment and remuneration of tribunal secretaries in SIAC administered arbitrations.<sup>442</sup> It permits the tribunal to appoint a tribunal secretary in appropriate cases but does not provide clarity as to what constitutes an “appropriate” case.<sup>443</sup> It requires that the tribunal seeks prior consent of all the parties to the arbitration and that the tribunal secretary executes a declaration of independence, impartiality and confidentiality prior to the appointment.<sup>444</sup>

The Practice Note however lays down a clear scheme as to the remuneration of the tribunal secretaries.<sup>445</sup> It stipulates that no additional fees is to be paid by the parties if the amount of dispute is under 15 million Singapore Dollars. On the other hand, if the amount in dispute is

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<sup>438</sup> *Id.* Para 217

<sup>439</sup> *Id.* Para 222-223

<sup>440</sup> *Id.* Paras 229-230

<sup>441</sup> *Id.* Paras 227-230

<sup>442</sup> Practice Note for Administered Cases – On the Appointment of Administrative Secretaries, <https://siac.org.sg/practice-note-for-administered-cases-on-the-appointment-of-administrative-secretaries> (last visited Jan 10, 2024).

<sup>443</sup> *Id.* Para 2; MARK MANGAN, JOHN CHOONG, & NICHOLAS LINGARD, A GUIDE TO THE SIAC ARBITRATION RULES (Second edition ed. 2018). Para 8.23

<sup>444</sup> Practice Note for Administered Cases – On the Appointment of Administrative Secretaries, *supra* note 442. Paras 2-3

<sup>445</sup> *Id.* Paras 5-6

greater than, the tribunal is permitted to come to an agreement with parties that is no greater than 250 Singapore Dollars per hour.

Additionally, the provisions of SIAC Rules 38 and 39 stipulate that secretaries are subject to the same exclusion of liability and confidentiality obligations as tribunal members and SIAC officers.<sup>446</sup>

To sum up, there are requirements as to the formalities of appointment of tribunal secretaries as well as a scheme for their remuneration.

#### 4.4.2.3. HKIAC, Hong Kong

Hong Kong International Arbitration Centre [hereinafter, HKIAC] has the most extensive of guidelines to regulate the practice of tribunal secretaries. A key difference in approach being that it allows members of its secretariat to act as a tribunal secretary with the caveat that in such a situation, they would not be the case counsel (that is, the institutional secretary appointed to liaise with tribunal on behalf of HKIAC).<sup>447</sup> The tribunal is required to inform the parties to solicit their comments on a proposed candidate by sharing his CV and a declaration confirming his impartiality and independence, including, any disclosure that may give rise to justifiable doubts as to his impartiality or independence.<sup>448</sup> The tribunal is prohibited from delegating any decision-making function to the tribunal secretary.<sup>449</sup>

These guidelines also provide for a scheme for remuneration of the tribunal secretary.<sup>450</sup> It requires the tribunal to consult with the parties to determine the total fees and expenses of an administrative secretary. In those cases, where the tribunal is remunerated hourly then, the secretary is also to be remunerated on an hourly basis. On the other hand, where the fees of the tribunal is determined by the amount in dispute then, the secretary is to be paid from the fees of the tribunal expected to be shared equally amongst the members of the tribunal.

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<sup>446</sup> SIAC, *SIAC Rules*, 2016, [https://siac.org.sg/wp-content/uploads/2022/06/SIAC-Rules-2016-English\\_28-Feb-2017.pdf](https://siac.org.sg/wp-content/uploads/2022/06/SIAC-Rules-2016-English_28-Feb-2017.pdf) (last visited Jun 7, 2024). Rules 38, 39

<sup>447</sup> Hong Kong International Arbitration Centre, *Guidelines on the Use of a Secretary to the Arbitral Tribunal*, (2014), <https://www.hkiac.org/images/stories/arbitration/HKIAC%20Guidelines%20on%20Use%20of%20Secretary%20to%20Arbitral%20Tribunal%20-%20Final.pdf> (last visited Apr 18, 2023). Para 2.5

<sup>448</sup> *Id.* Paras 2.2-2.5

<sup>449</sup> *Id.* Para 3.2

<sup>450</sup> *Id.* Paras 4.1-4.4

Additionally, HKIAC is the first among IACs to establish a full-fledged training program for tribunal secretaries that is open to any person interested to become a qualified tribunal secretary.<sup>451</sup> It is in response to practical demand among aspiring arbitrators as well as professionals to gain first-hand view of workings of arbitrators.<sup>452</sup>

To sum up, HKIAC has the most institutionalized of programs for tribunal secretaries, that not only provides for appointment of secretaries from its own secretariat but also involves formal training and accreditation service. This is in addition to the rules concerning appointment and remuneration.

#### 4.4.2.4. SCC, Stockholm

The Swedish Arbitration Act, 1999 does not explicitly provide for the appointment of tribunal secretaries. However, its *travaux* provides that it would be “permissible to appoint a legally trained secretary if the parties’ consent is obtained”.<sup>453</sup> This is of relevance as law’s preparatory material has a strong influence on the interpretation of the law.<sup>454</sup>

The SCC Rules require that the tribunal seek the consent of the parties and submit the request to the SCC Secretariat for appointment of tribunal secretary.<sup>455</sup> The tribunal is required to consult the parties as to the delegable tasks while at the same time is restrained from delegating any decision-making.<sup>456</sup> Furthermore, the proposed secretary is required to submit statement of availability, impartiality and independence, including any disclosure that may rise to justifiable doubts, to the Secretariat prior to the appointment.<sup>457</sup> The tribunal is expected to cover the remuneration of the tribunal secretary.<sup>458</sup>

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<sup>451</sup> HKIAC: Tribunal Secretary Training Programme, <https://www.hkiac.org/arbitration/tribunal-secretaries/tribunal-secretary-training-programme> (last visited Mar 3, 2024).

<sup>452</sup> HONG KONG TRADE DEVELOPMENT COUNCIL, *Enhancing Hong Kong’s Position as the Leading International Arbitration Centre in Asia-Pacific*, (2016), [https://www.doj.gov.hk/tc/legal\\_dispute/pdf/InternationalArbitrationCentre.pdf](https://www.doj.gov.hk/tc/legal_dispute/pdf/InternationalArbitrationCentre.pdf) (last visited Apr 18, 2023). Pg. 19

<sup>453</sup> JENSEN, *supra* note 149. Para 2.69

<sup>454</sup> *Id.* Para 2.69

<sup>455</sup> Stockholm Chamber of Commerce, *Arbitration Rules of the SCC Arbitration Institute*, 2023, (2023), [https://sccarbitrationinstitute.se/sites/default/files/2023-03/1.-scc\\_arbitration\\_rules\\_2023.pdf](https://sccarbitrationinstitute.se/sites/default/files/2023-03/1.-scc_arbitration_rules_2023.pdf) (last visited Apr 18, 2023). Article 24(1)

<sup>456</sup> *Id.* Article 24(2)

<sup>457</sup> *Id.* Articles 24(3) - 24(4)

<sup>458</sup> *Id.* Article 24(6)

To sum up, the SCC Rules provide for disclosure at the stage of appointment as well as specific consent from the parties, both as to the proposed candidate and delegable duties.

#### 4.4.2.5 Institutional rules summed up

The above sub-sections allows to ascertain the *tronc commun* or the commonalities present across different institutional rules as to regulation of the tribunal secretary.<sup>459</sup> Three common threads can be identified from these rules.

First, they provide for appointment of tribunal secretary to fit with requirement of party autonomy by specifically requiring prior consent from the parties and thus, allaying any that parties may have as to the proposed candidate.

Second, the tribunal secretary is specifically required to provide a formal statement of impartiality and independence prior to appointment. HKIAC extends this need even to its own institutional secretaries if they are appointed as a tribunal secretary in a particular arbitration.<sup>460</sup>

Third, there are specific schemes for reimbursement of the tribunal secretary. Even though these schemes differ but their specific inclusion ensures that the process of formalization of appointment of tribunal secretary is open and expectations of who is to reimburse are clear.

A fourth common thread with one exception is non-delegation of decision-making to the tribunal secretary. Though, the SIAC Practice Note does not specifically stipulate that the tribunal should not delegate decision-making but as would be discussed in Chapter 6, it is the foundational principle governing the relationship between the tribunal and the tribunal secretary.

Additionally, the foregoing reveals two key values of the ICA community, first, is the centrality of party autonomy with the tribunal under specific duty to seek the consent of the parties prior to the appointment of the tribunal secretary and second, to restrict any delegation of decision-making to the tribunal secretary. These values are shared across the IACs and thus, are also part of its episteme.<sup>461</sup>

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<sup>459</sup> Karton, *supra* note 389.

<sup>460</sup> Hong Kong International Arbitration Centre, *supra* note 447. Para 2.5

<sup>461</sup> Refer Section 3.2.2. of Chapter 3 for a greater discussion on values. Refer Chapter 6 for detailed discussion on the principle of *intuitu personae* or non-delegation of decision-making to the tribunal secretary.; For a discussion on epistemic communities refer specifically, Bianchi, *supra* note 148.; Also, Hans-Patrick Schroeder & Wolfgang Junge, *Tribunal Secretaries Re-Examined—Comparative Legal Framework, Best Practices, and Terms of Appointment*, 38 ARBITRATION INTERNATIONAL 21 (2022).

#### 4.4.3. THE INFORMAL OR THE UNDISCLOSED SECRETARY

However before proceeding to proposing the definition for tribunal secretary in this thesis, it is necessary also to consider tribunal secretaries that are appointed informally or who act undisclosed to the parties.<sup>462</sup> These are not mere anecdotes but a continuing concern within the ICA community with Constantine Partasides, as recently as 2017 putting it bluntly in his article on the need of transparency with respect to tribunal secretaries, as “No more ‘secret secretary’. No more saying a secretary is only doing one thing, but doing many others.”<sup>463</sup>

Yukos case, while bringing the tribunal secretary issue to limelight, is an example of informally appointed tribunal secretary.<sup>464</sup> The said secretary was appointed by the presiding arbitrator with the verbal disclosure that the person so appointed was to assist with communication in case the arbitrator is unavailable.<sup>465</sup> The appointment lacked any formal statement or even recording as an appointed tribunal secretary in an order of the tribunal. Eventually, the tribunal secretary billed more hours than any other arbitrator making the appointment and the conduct as one of the grounds for challenge of the award itself.<sup>466</sup>

In order to understand the practices within the ICA community, it is therefore, necessary to consider such cases of informal appointments, where formal documentation or recording of appointment is absent but the parties are aware of the tribunal secretary and undisclosed appointments, where the arbitrator is assisted by a tribunal secretary unknown to the parties. This is necessary for two reasons, first, to learn the patterns in relationship and reliance of tribunal secretaries and second, in order to also benefit from experience of the interviewees who were appointed or worked in such a manner. Though, it is acknowledged that the practice

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<sup>462</sup> Zachary Douglas, *supra* note 14.; David Zaslowsky & Grant Hanessian, *The Fourth Arbitrator: Contrasting Guidelines on Use of Law Secretaries*, (2013), <https://www.lexology.com/library/detail.aspx?g=e7826e7b-0a84-409d-9ebb-af84ad6d1d3f> (last visited Apr 18, 2023). Narrates that, “one of us fell into a conversation at an arbitration conference with a young man who spoke knowledgably about a pending arbitration in which one of us was counsel. He indicated that he had been working with the chairman, unbeknownst to the parties. This individual’s identity, background and role had not been disclosed to the parties, nor had any conflicts of interest that might have existed been explored. In another instance, a resume of a young lawyer reflected his participation in a long list of seemingly important arbitrations (described generically), far more than a person of his tender years could have been involved in. It developed that he had served as a law secretary to a well-known arbitrator with a practice of using secretaries as (paid or unpaid) apprentices.”

<sup>463</sup> Constantine Partasides, *supra* note 5. Pg. 8

<sup>464</sup> Refer Section 6.2.4.1. of Chapter 6 for more fuller discussion on the Yukos case. More specifically refer, Bermann, *supra* note 426.; Expert Opinion of Professor George A Bermann (Hulley Enterprises and Ors. v. The Russian Federation 1:14-CV-01996-ABJ), *supra* note 15.

<sup>465</sup> Expert Opinion of Professor George A Bermann (Hulley Enterprises and Ors. v. The Russian Federation 1:14-CV-01996-ABJ), *supra* note 15. Para 100

<sup>466</sup> *Id.* Paras 109-113

of undisclosed assistance is difficult to locate due the fact that it is undisclosed and thus, unavailable to either the parties or the public.

To not do so, not only risks removing potential candidates for empirical research as well as part of their practice but, also would weaken the engagement with the extant literature.<sup>467</sup> This is also necessary in order to present a more whole picture of how tribunal secretaries work in practice as well as the consequences of being a tribunal secretary, even if large number of interviewees cannot be identified in this respect.

Therefore, the thesis factors this element of informality and non-disclosure as part of the research erring on the side of presenting what is available as opposed to leaving the entire issue out of consideration. This is in line with the methodological choice of informing the written law with the practice of law so that the empirical findings leads to a holistic picture.<sup>468</sup>

#### **4.5. TRIBUNAL SECRETARY DEFINED**

This section defines the tribunal secretary incorporating their function as well as benefiting from different institutional rules and guidelines. It also synthesizes the concerns of informal and undisclosed secretarial support. In other words, the definition incorporates the distinctions in terms of its role in the arbitral proceedings, rules and guidelines issued by the IACs as well as the concerns within the ICA community. These are:

*First*, in terms of engagement with record of the arbitration proceedings, the tribunal secretary stands apart from the tribunal-appointed or party-appointed expert in two crucial ways. First, tribunal secretary does not add to the record of the proceedings, that is, at no stage, any of the activities become part of the proceedings. Second, tribunal secretary is not subject to cross-examination like the experts, either by the parties or the tribunal. In this manner, the tribunal secretary is distinct from a party-appointed expert, who presents the parties' case before the tribunal while being subject to rules of procedure, including cross-examination and thus, do not requiring any specific declaration of impartiality or independence.<sup>469</sup>

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<sup>467</sup> For instance, Paul Di Pietro, *supra* note 349. Narrates some discomforting situations handled by ICC; While Jean Pierre-Fierens, *supra* note 17. Has narrated a positive experience of a hidden secretary.

<sup>468</sup> Refer Chapter 3 for fuller discussion on methodological choices and design of the empirical study.

<sup>469</sup> Refer section 4.3-4.4 for discussion on experts and requirements of signing declarations of independence and impartiality by the tribunal secretaries.

*Second*, the tribunal secretary does not determine the content of the record, that is, what should constitute the evidence unlike a document production master.<sup>470</sup> A document production master possesses authority to exercise judgment as to what should become part of the record. Moreover, the document production master is not required to assist the tribunal beyond this specific duty. Thus, this role stands in contradistinction to that of tribunal secretary in their authority to decide evidence that is incorporated as evidence as well as end of their responsibilities subsequent to it .

*Third*, a tribunal secretary is expected to remain appointed for the entire duration of the proceedings and thus, its role is not specific to a particular stage of proceedings unlike, the tribunal-appointed expert, party-appointed expert, institutional secretary or document production master.

*Fourth*, though tribunal secretary may carry out peripheral tasks like arranging the logistics for the venue and provide clerical support during the hearings but, tribunal may decide for more broader responsibilities. That is, in some cases it might be so that this is all what a tribunal secretary does but, tribunal may decide to seek other forms of assistance not being restrained to such logistical and peripheral tasks.<sup>471</sup>

*Fifth*, though the last decade has seen a move towards a formal mandate and transparency in terms of tasks, it is necessary to factor informal and undisclosed reliance on tribunal secretaries.<sup>472</sup>

*Sixth*, in response to the growing trend where IACs extend members of their staff as formal tribunal secretaries in ongoing arbitrations, therefore, it is necessary to include the experience of such secretarial support originating from the staff of IACs.

*Seventh*, the tribunal secretary has access to the entire record of the arbitration proceedings. In this manner, the tribunal secretary is distinct from all the other actors, including experts, document production master, institutional secretary and those providing logistical support. None of them have continued access to the documentation from the perspective of the tribunal and none are expected to maintain the order of the documentation in view of the needs of the tribunal.

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<sup>470</sup> Refer Section 4.3.2. for discussion on document production master.

<sup>471</sup> Refer Section 4.3.3. for more detailed discussion.; More specifically, JENSEN, *supra* note 149. Para 1.30

<sup>472</sup> Refer Section 4.4.3. for more detailed discussion.

*Eighth*, the tribunal secretary is directly responsible to directions of the tribunal on an ongoing basis with parties' role restricted to grant of their consent for their appointment. And thus, once appointed, the tribunal secretary acts solely on the directions of the tribunal.

Put together, the definition adopted for tribunal secretary thus, involves appreciating this specific role where the person so appointed, irrespective of the peculiarity of title, is

- (a) Appointed by the tribunal to provide ongoing assistance to the tribunal usually for the entirety of the proceedings;
- (b) Maybe known to the parties to be acting in such capacity with their prior-informed consent as part of his appointment as per specific institutional rules or through informal means or might even be unknown to them;
- (c) Involves tasks and duties that may include but are not restricted to the logistical tasks for the conduct of the proceedings;
- (d) Does not add to the record of the arbitration nor decides what is appropriate for the record;
- (e) Is not subject to cross-examination during the course of the work;
- (f) Receives some form of remuneration either negotiated by the tribunal with the parties or paid directly by the tribunal in view of specific institutional rules;
- (g) May include institutional secretaries that act as tribunal secretaries in a particular arbitration.

Thus, this thesis uses this broad definition to both identify the role of the Tribunal Secretary, the legal framework they operate within and finally, their role within the ICA community.

#### **4.6. SUMMING UP**

Summing up, this chapter provides the definition to ascertain who is a tribunal secretary for the purpose of this research. In order to do this, it incorporates a functional criteria to identify the tasks that the tribunal secretary may do and may not do alongside the formalization procedure laid down by the IACs and concerns of informal or undisclosed secretarial support.

The rules and guidelines of IACs are studied comparatively to identify common threads that are shared so as to understand the institutions regulating the appointment and remuneration of tribunal secretaries. This is done through comparative analysis in order to identify the widely used sanctions and regulations.

This methodological choice leads to a definition of the Tribunal Secretary that incorporates the aforementioned rules and guidelines alongside its practice in terms of both its place within the arbitral proceedings and that within the ICA profession.

In simple words, a tribunal secretary is one of the many forms of third-party assistance available to the tribunal. It involves working directly with the tribunal but without any authority to contribute to the record or decide its content and is not subject to cross-examination. He may be appointed with parties' consent, either formally or informally, or may provide undisclosed assistance to the tribunal.

# CHAPTER FIVE

## MASTERING THE FILE: INEVITABILITY OF TRIBUNAL SECRETARY

“The secretary must have a perfect knowledge of the file and the documents that have been submitted.”<sup>473</sup>

“One chairman reports that the decision not to appoint a tribunal secretary to handle the administrative aspects of the case: “has involved me in an immense amount of time in labour, drafting and dispatching letters and telexes and conducting telephone calls to and with representatives of four parties, as well as my fellow arbitrators. [...] A secretary would be very much more economical!””<sup>474</sup>

### 5.1 INTRODUCTION

This is one of the three chapters of this thesis where the empirical findings are presented alongside discussion of existing law and doctrines of ICA as well as the published literature. This chapter begins what Jean Pierre-Fierens wrote of the assistance provided by the Tribunal Secretary - “perfect knowledge of the file and the documents”.

The empirical component of this thesis focused on the three tensions, namely, *first*, Tribunal Secretary’s engagement with the evidence and written submissions by the parties; *second*, the role of Tribunal Secretary in preparation of drafts of orders and; *third*, Tribunal Secretary’s involvement in the deliberations of the tribunal.<sup>475</sup> This chapter focuses on the first of these tensions.

These are two inter-related tasks of organizing the files as well as preparation of internal notes. The first requires the tribunal secretary to ensure that the files are kept in order and the latter

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<sup>473</sup> Jean Pierre-Fierens, *supra* note 17. Pg. 113

<sup>474</sup> JENSEN, *supra* note 149. Citing Pierre Lalive, “Un post-scriptum et quelques citations” (1996) 14 ASA Bull 35, 40 quoting an ‘English judge, member of the House of Lords’

<sup>475</sup> {To be covered under the Empirical study chapter 4 where the questionnaire, design and coding is discussed} More specifically, refer Maarten Draye and Emily Hay, ‘The Arbitral Secretary: Unnecessary Nuisance or Unsung Hero – A Practitioner’s View’, pg 91 in ARBITRAL SECRETARIES: REPORTS FROM THE JOIN NAI-CEPANI COLLOQUIUM, OCTOBER 5, 2017, (Filip De Ly & Luc Demeyere eds., 2018).

posites preparation of notes as required by the arbitrators. Within this lies the tension of appropriate direction, supervision and verification by the arbitrators.

Thereafter, it proceeds to present how judicialization has contributed towards and continues to justify the practice of the Tribunal Secretary.<sup>476</sup> This is so because an effective regulation would have to be able to navigate and respond to the concerns and the visions that is shared by the ICA community. Its mapping therefore, presents the discussion on the practice alongside the values and state of current rules before concluding.

That is, here the emphasis is to present the rules, reasoning and their articulation alongside an engagement with the practice of being Tribunal Secretary. The inferences of this thesis are summed up in this section, including, the two key inferences namely - that that the Tribunal Secretaries are likely to remain a fixture of ICA as long as the practice of ICA is not fundamentally transformed and; second, that a regulated approach that corresponds to the shared practices is likely to be more effective as opposed to an approach where there is a misalignment between practice, value and eventual rules.

## **5.2. MASTERING THE FILE**

Twice, Jean Pierre-Fierens, a respected arbitrator writing a reflective article on how he works with tribunal secretaries, stresses on the “perfect knowledge” of the file on the part of the tribunal secretary.<sup>477</sup> The first of the reference relates to the organization, maintenance and facilitating navigation of the documents in the arbitration record.

This section begins with presentation of what constitutes this perfect knowledge or as one of the key themes of the empirical study has been: “Mastering the File”. Here the outcomes of the interviews as well as the literature are discussed in order to understand what constitutes the mastering of the file before proceeding to the empirical study that discuss the functions of the tribunal secretary. This is followed by discussion of the case-law and the institutional guidelines on this issue before discussing the tensions inherent in the direction, supervision and verification of tasks done by the tribunal secretaries.

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<sup>476</sup> Refer Section 2.3. of Chapter 2 on detailed discussion on judicialization of ICA.

<sup>477</sup> Jean Pierre-Fierens, *supra* note 17.

### 5.2.1. ORGANIZING THE FILE

As a preliminary, the tribunal secretary is expected to take charge of properly organizing all the documents. This task is seen as obvious that the person discharging the function of tribunal secretary would undertake.<sup>478</sup>

By organizing the file, the task is understood as comprehensive arrangement of all the submissions, documents, important communications and timelines associated with the proceedings. Here, the tribunal secretary is tasked with ensuring their completeness and organizing them so as to enable the tribunal to access them with ease as well as coherency. This involves two immediate tasks - first, to ensure that all the documents that are submitted are complete, legible and in case of electronic submission are searchable and second; to check the contents of the documents in order to flag or point out any urgent reliefs sought or request for amendment of reliefs is made.<sup>479</sup> This gains in importance as the arbitrators usually have multiple appointments and therefore, there is a constant influx of filings and communications coming regularly. In turn, it means that the arbitrators have to engage with the questions or issues put forth by the parties (for instance, urgent requests or extensions) as well as manage the handling of the documents and submissions.<sup>480</sup>

Both the arbitrators and the tribunal secretaries understand this systematization as an obvious and the minimum task associated with being a tribunal secretary. That is, by virtue of holding this position, the tribunal secretaries understand that they must maintain the file in good order.<sup>481</sup> This involves arranging the various filings that come under the suitable heading as well as ensuring that the files remain contemporaneous to the stage of the proceedings.

For instance, if the documents are filed as physical copies, then, the secretary is expected to arrange them as per their content as well as chronology of their order of filing. This arrangement is expected to be coherent, that is, it must be identical for both the claimants and respondents. Additionally, Tribunal Secretary prepares a clean file that may be necessary during hearings, for instance during the cross-examination of the witnesses.<sup>482</sup> Moreover, the

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<sup>478</sup> Venus Valentina Wong, *Administrative Secretaries to Arbitral Tribunal: A Note from Practitioner's Perspective*, II SLOV. ARB. REV. 14. At pg. 15 calls it the "original purpose" of the tribunal secretary; Also, the ICC Perspective refer: Paul Di Pietro, *supra* note 349.

<sup>479</sup> JENSEN, *supra* note 149. Para 5.154 page 233

<sup>480</sup> Interview theme, administrative and logistical, more specifically, interviewees 4 and 6.

<sup>481</sup> Venus Valentina Wong, *supra* note 478; Jean Pierre-Fierens, *supra* note 17.

<sup>482</sup> Venus Valentina Wong, *supra* note 478.

co-arbitrators should also be able to follow this arrangement. Usually (though, it may differ to an extent by preferences of the arbitrators), the case file is arranged under eight broad headings, being,

1. Submissions of the parties,
2. Written statements,
3. Expert Reports,
4. Documents and Exhibits,
5. Procedural Orders (including the redfern or stern schedule),
6. Correspondences,
7. Minutes of the hearings and
8. Award.<sup>483</sup>

In case the filings are done electronically (as did happen during the covid years but also due to embrace of new technologies), the tribunal secretary is expected to ensure that the electronic files are downloaded within the time limits. This is so because sometimes the files are shared through an expiring fire share-link and therefore, require downloading before the time expires.<sup>484</sup> Additionally, the arbitrators require the tribunal secretary with maintaining the cloud storage of these files for accessibility.<sup>485</sup> Finally, the tribunal secretary is expected to maintain sufficient backups of the files so as to avoid a situation where a particular file or document is lost and thus, requiring reaching-out to the parties for a new copy.

The tribunal secretary is also expected at this stage to ensure that the documents are scanned and properly placed in the electronic file folders. He is further tasked with managing the powers of attorney and other documents needed for endorsement of terms of reference or initiation of the proceedings.<sup>486</sup> Thus, all this requires that the record of the parties' communications and planned procedures are maintained. All these tasks form the backdrop of the proceedings assisting in the initiation as well as monitoring of the different phases of the proceedings.<sup>487</sup>

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<sup>483</sup> “TRIBUNAL SECRETARIES IN INTERNATIONAL ARBITRATION” - A KFCRI WEBINAR SERIES - 22.07.2020, (2020), <https://www.youtube.com/watch?v=TNiUE7IdIA4> (last visited Dec 24, 2023).

<sup>484</sup> JENSEN, *supra* note 149. At paras 5.154, 5.155

<sup>485</sup> “TRIBUNAL SECRETARIES IN INTERNATIONAL ARBITRATION” - A KFCRI WEBINAR SERIES - 22.07.2020, *supra* note 483.

<sup>486</sup> Jean Pierre-Fierens, *supra* note 17.

<sup>487</sup> Pierre Tercier, *supra* note 9. Pages 540, 546.

Empirical surveys also support delegation of such tasks to the tribunal secretary. For instance, Young ICCA Survey found 79.6% respondents supporting handling correspondence and evidence and 74.2% supported the task of reminding parties of deadlines.<sup>488</sup>

Arbitral institutions have taken a similar approach. Paul Di Pietro writing on the ICC's perspective highlighted that the tasks such as transmitting documents, maintaining arbitral tribunal's files and locating documents are examples of tasks that the tribunal secretary may perform in an ICC arbitration.<sup>489</sup> This is also true for HKIAC, SIAC and SCC with respect to organizational tasks that involve management of files.<sup>490</sup>

Though, it is ordinary to maintain the record and files but the task of tribunal secretary is not merely re-arrangement and ordering but also to engage at a broader level to apprise the arbitrators both as to any urgent reliefs as well as any deadlines. This means that the tribunal secretary has to engage with the contents of the files at least to an extent as well as to understand the stage of the arbitration proceeding. This itself is an important component being the first steps towards understanding what perfect knowledge of the file could mean.

### 5.2.2. MASTERING THE FILE

The organizing of the file can be seen as a prelude to what Jean Pierre-Fierens meant as perfect knowledge of the file. It is an understanding of what the parties' have requested and on what grounds. Tommaso Soave's fictional character Carlos, a secretary for an ideal-ISDS proceedings, presents this core aspect with clarity in its discussion of preparation of bench-memo.<sup>491</sup> Carlos' bench-memo is designed to provide a complete overview of the proceedings and includes description of events that led to arbitration, presentation of non-contentious facts, disputed facts, list of legal issues alongside parties' arguments and relevant case.<sup>492</sup> Pierre Tercier calls this the first working document that provide for chronology of facts, topical

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<sup>488</sup> YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, *supra* note 322. Pg. 2

<sup>489</sup> Paul Di Pietro, *supra* note 349. Pg. 105

<sup>490</sup> HKIAC Guidelines 3.3; JAKOB RAGNWALDH, FREDRIK ANDERSSON, & CELESTE E. SALINAS QUERO, A GUIDE TO THE SCC ARBITRATION RULES (2020). Article 24; Formation and Challenge of the Arbitral Tribunal (SIAC Rules 9 to 18)', in John Choong , Mark Mangan , et al., A Guide to the SIAC Arbitration Rules page 137;

<sup>491</sup> TOMMASO SOAVE, THE EVERYDAY MAKERS OF INTERNATIONAL LAW: FROM GREAT HALLS TO BACK ROOMS (1 ed. 2022), <https://www.cambridge.org/core/product/identifier/9781009248013/type/book> (last visited Jan 14, 2024). Pages 163-165 Presents the fictional character of Carlos, a secretary acting for a fictional ISDS proceedings. Though, this thesis is restricted to ICA but as explained in Chapter 2, the character of Carlos, exaggerated and slightly comic, does present certain aspects of being Tribunal Secretary with quite a clarity. Preparation of internal documents, including, the bench memo being a case in point; Also, Interviewee # 3 emphasized the importance of mastering of file specifically citing preparation of bench-memo as a key task.

<sup>492</sup> *Id.*

organization of exhibits, brief discussion on the disputed issues along with orderly presentation of expert reports.<sup>493</sup>

The Tribunal Secretary is not confined to preparation of only one single comprehensive document like the bench memo or the first working document but prepares series of internal notes. These include:

1. summarization of the parties' submissions,
2. topic-wise arrangement of expert reports,
3. conflict mapping where opposing arguments are tabulated next to each other,
4. preparation of chronology of facts,
5. summarization of submissions for procedural hearings,
6. lists of legal, technical or factual issues facing the tribunal and,
7. decision-making tree or matrix.<sup>494</sup>

This is not an exhaustive list because tribunal secretaries adjust to the needs of the arbitrator.<sup>495</sup> Moreover, the possibility of internal notes that maybe prepared is quite large because it would depend on the stage of the proceeding, the nature of the dispute and the specific query of the tribunal. But the above broadly covers most of the internal documentation that maybe prepared by the tribunal secretaries during the course of the proceedings.

The summarization of submissions, whether for the procedural hearings or the final hearing, is a common task done by the tribunal secretary. It assists in providing an overview of the dispute by concisely presenting the case put forth by the parties alongside the documents or reports relied by them.

The preparation of chronology of facts or list of dates is another important task highly appreciated by the arbitrators because of its time saving character as well as identifying the factual issues present in the case where the parties do not have an agreement.

The conflict chart is listing of the opposing arguments next to each other on a table with one side of the table listing claimant's arguments with the opposing argument by the respondent on

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<sup>493</sup> Pierre Tercier, *supra* note 9.

<sup>494</sup> "TRIBUNAL SECRETARIES IN INTERNATIONAL ARBITRATION" - A KFCRI WEBINAR SERIES - 22.07.2020, *supra* note 483.; Constantine Partasides et al., *supra* note 207.; Jean Pierre-Fierens, *supra* note 17.; Michael Polkinghorne and Charles B Rosenberg, *supra* note 16. Pg 123; Olufunke Adekoya, *supra* note 11. Pg 753.

<sup>495</sup> Code: Flexibility, Interviewees # 2, 5, 8

the other side. This allows for a clearer overview of the legal or technical arguments as well as the basis upon which they are made.

All these tasks are designed to assist the tribunal to focus and engage with the issues that require decision-making. And all these tasks require a deep engagement with the file. While, the task of organizing the file gives the tribunal secretary a picture of what the case is about, these tasks train him into its details. On the other hand, the tribunal secretary by putting this onto paper engages with the proceedings gaining both the understanding of the parties' positions as well as the relevant technical, legal or factual issues that the arbitration requires.<sup>496</sup>

The arbitrators expect that the tribunal secretary acts like "search function"<sup>497</sup> who knows the file extremely well and acts like a backup memory to point out relevant documents and arguments.<sup>498</sup> The tasks of organizing the file and the knowledge of the file are seen as related to each other with the goal being that the tribunal secretary knows the file in order to assist the tribunal as and when needed.<sup>499</sup>

The purpose of these reviews being explicitly to act an assisting tool so that details of the proceedings or the arguments are not overlooked by the arbitrator.<sup>500</sup> Similarly, the tribunal secretary's presence in deliberations is justified on the basis of his knowledge of the arbitration so that the tribunal have quick and efficient access to the files.<sup>501</sup> For instance, as one interviewee, a senior arbitrator, recounted that the knowledge of file by a tribunal secretary assisted the tribunal in discussion of complex points.<sup>502</sup> The preparation of such notes therefore is not merely for the arbitrators but also enable the tribunal secretary to get a better grip on the proceedings.

As one interviewee, an experienced arbitrator, counsel and an academic, put it - "school of arbitration, first class".<sup>503</sup> This is because the arbitrators expect the tribunal secretaries to know

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<sup>496</sup> Code: Drafting

<sup>497</sup> Interviewee # 6

<sup>498</sup> Code: Knowledge of the File, Interviewees # 4, 6, 9, 10; JENSEN, *supra* note 149. Para 2.19

<sup>499</sup> Interviewee # 4

<sup>500</sup> JENSEN, *supra* note 149. Para 2.19

<sup>501</sup> Pierre Tercier, *supra* note 9.

<sup>502</sup> Interviewee # 6

<sup>503</sup> Interviewee # 9

the file in and out<sup>504</sup> or as Jean Pierre-Fierrens put it the “perfect knowledge of file”<sup>505</sup>. This is the first step of being Tribunal Secretary. It is the mastering of the file. This is essential to be able to act as a tribunal secretary effectively throughout the proceedings. The knowledge of the file enables the tribunal secretary to follow the proceedings and provide reminders whether to the parties or the tribunal as to any oncoming stage or activity. Additionally, it is crucial for the tribunal secretary in order to be able to effectively take instructions from the arbitrators. Not knowing the file would not only delay the carrying-out of the required activity but may influence the understanding of the direction itself. Arbitrators rely on the secretaries to be able to apprise them of the file and its details when requested. The preparation of notes, therefore, is the gateway for the deep engagement with the details of the file. Pierre Tercier acknowledges that some of these notes become the basis for the final award.<sup>506</sup>

In turn, the arbitrators are able to focus on themselves on the decision-making aspects of the proceedings. That is, these notes assist in navigation of the files and facilitating an easier engagement with the record.<sup>507</sup> The benefit of such internal notes being to make the engagement with the record more pointed, that is, to be able to engage with the specific questions that the tribunal sees most relevant.

However, empirical surveys paint a more conflicted picture with regard to mastering of the file by the tribunal secretary. For instance, while there was a strong support with 85.7% of respondents in the 2013 Young ICCA survey supporting tribunal secretaries carrying out legal research but only 47.3% supported tribunal secretaries identifying documents and evidence and similarly only 49.5% supported carrying out review of the parties’ submission and drafting memoranda.<sup>508</sup>

### 5.2.3. TENSIONS OF DIRECTION, SUPERVISION AND VERIFICATION

The English case of *Sonatrach v. Statoil*<sup>509</sup> specifically dealt with the issue of preparation of internal notes. In this case, the appellant argued that the tribunal secretary had exceeded his mandate by participating in the deliberations and towards this end, argued that the preparation

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<sup>504</sup> Code: Knowledge of the File, Interviewees # 6, 9

<sup>505</sup> Jean Pierre-Fierrens, *supra* note 17.

<sup>506</sup> Pierre Tercier, *supra* note 9. Page 546.

<sup>507</sup> “TRIBUNAL SECRETARIES IN INTERNATIONAL ARBITRATION” - A KFCRI WEBINAR SERIES - 22.07.2020, *supra* note 483.

<sup>508</sup> YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, *supra* note 322. Pages 2, 11-15.

<sup>509</sup> *Sonatrach v Statoil* [2014] EWHC 875 (Comm)

of three notes by the tribunal secretary towards deliberations constituted such an inference. The English High Court rejected this argument noting that the preparation of such internal notes was a standard practice in ICC arbitrations and that production of such notes would constitute breach of secrecy of deliberations.

Underlying the case is also the unease associated with such preparation where secretaries exercise influence over the proceedings. This is borne out by the Young ICCA Surveys.<sup>510</sup> In it, while 79.6% of respondents acknowledged that tribunal secretaries can handle the evidence and submissions but, only 47.3% agreed that these secretaries should identify the documents, and 49.5% concurred with their involvement in reviewing the parties' submissions.<sup>511</sup>

This is exemplified by Soave in the story of the fictitious Carlos whose bench-memo takes the shape of two memos: the full version for his boss, the chair of the tribunal and the redacted one for circulation among the co-arbitrators. The idea being that sharing of the bench memo revealed the preference of the chair as well as would reveal any pre-judgment on the part of the chair.<sup>512</sup> The underlying idea being that the bench-memo or internal notes reveal not just summaries but also preferences and inferences of the proceedings.

That is, the engagement of the tribunal secretary even only to summarize submissions and evidence is inviting involvement in the proceedings. In this case, the summaries also reflect the inferences that the tribunal secretary would be bound to draw in order to make a necessarily long-submission into a much-more concise document.<sup>513</sup> Thus, as a process the tribunal secretary would have some degree, however indirect, over the tribunal because of his choice of documents, exhibits, reports that are accentuated or diminished as part of the preparation of internal notes.<sup>514</sup>

These criticisms in effect infer two failures: first, of improper supervision and verification by the tribunal and second, of tribunal secretary's influence over the arbitrator's judgment. The interviews reveal a quick grasp of these ideas among the arbitrators. The arbitrators stressed the importance of clarity of instruction as well as the verification and reviewing of the files.<sup>515</sup>

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<sup>510</sup> YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, *supra* note 322.

<sup>511</sup> *Id.* Pages 2, 11-15

<sup>512</sup> TOMMASO SOAVE, *supra* note 491. Pg 164

<sup>513</sup> Partasides, *supra* note 425. Pg. 157

<sup>514</sup> YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES, *supra* note 322. Page 26

<sup>515</sup> Interviewees # 3, 4, 6, 10

They emphasized that the instructions are given clearly and then the resulting notes are not taken on face value but further cross-checked with the record. As one senior arbitrator put it that the essential part of the arbitrator is judgment call and that should not be lost during the process.<sup>516</sup> She further stressed that if the arbitrator is ‘bad’, that is, not conversant with the record then the tribunal secretary or his duties is unlikely to make it worse.<sup>517</sup> Similarly, another arbitrator, with background as tribunal secretary, clarified that a tribunal secretary does not know what goes in judgment call of the tribunal even though he may see the final product.<sup>518</sup> That is, she sought to distinguish the reasoning that goes onto the paper and the reasoning in the mind of an arbitrator where the tribunal secretary has only access to the one on the paper.

At core is the tension over the effectiveness of the arbitrator. Whether the arbitrator is conversant with the proceedings or not. And that only in the former case can the arbitrator exercise an effective supervision over the tribunal secretary. Jean Pierre-Fierens on his part narrated an anecdote where an unprepared arbitrator carried out effective arbitration because of the managerial skills of the tribunal secretary.<sup>519</sup>

The process of supervision is not a static act but a continuing one where the arbitrator engages with the file alongside the notes that he directs the tribunal secretary to prepare. In turn, for the tribunal secretary the directions he receives and is able to carry-out is similarly predicated upon his mastering of the file. A successful arbitration is one where both are conversant with the file and the tribunal secretary acts as a backup<sup>520</sup> or ‘search function’<sup>521</sup>.

In practice, it means adjusting to the needs of the arbitrator by the tribunal secretary while the arbitrators recognize that such notes are not substitute for engaging with the record. Rather, they see their ability to harness and rely upon tribunal secretaries as being contingent on their own knowledge of file.<sup>522</sup>

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<sup>516</sup> Interviewee # 6

<sup>517</sup> Interviewee # 6

<sup>518</sup> Interviewee # 3

<sup>519</sup> Jean Pierre-Fierens, *supra* note 17.

<sup>520</sup> JENSEN, *supra* note 149. Para 2.19.

<sup>521</sup> Interviewee # 6

<sup>522</sup> Interviewees # 4, 6, 9

### **5.3. THE PRACTICAL NEED FOR TRIBUNAL SECRETARY**

The backdrop of judicialization is central to the understanding of the practical need for tribunal secretaries.<sup>523</sup> It reflects both the actual practice as to how arbitrators see their utility in their practice as well as the rationale that is employed to justify their usage. The tribunal secretary, thus, has been seen as a solution to the problem of judicialization but as is also argued is an inevitable consequence of pressures of judicialization.<sup>524</sup>

This section addresses the pressures arising from judicialization that lead to the justification as well as reliance on tribunal secretaries. These practical demands are what contributes to their usage. Subsequently, the section progresses towards the central argument, that the tribunal secretaries has been a historical practice and now have become an established practice and would continue to remain a fixture within the ICA, with judicialization making their usage more pronounced and acceptable.

#### **5.3.1. SOLUTION FOR JUDICIALIZATION: “PAPER TSUNAMIS”**

Michael Schneider called the experience of judicialization as ‘Paper Tsunamis’ that pose difficulties for the arbitrators to absorb and extract relevant information from the ‘flood’ in form of filings made by the parties during arbitral proceedings.<sup>525</sup> Among the solutions that Schneider proposed to this ‘flood’ was of enlisting the aid of Tribunal Secretaries, who can assist the arbitral tribunal by managing the information and documents submitted to them, allowing the arbitral tribunal to focus on the key issues rather than peripheral tasks.<sup>526</sup>

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<sup>523</sup> Refer Section 2.3. of Chapter 2 for detailed discussion on judicialization of ICA.

<sup>524</sup> Refer Chapters 6 and 7

<sup>525</sup> Michael E Schneider, *The Paper Tsunami in International Arbitration: Problems, Risks for The Arbitrator’s Decision Making and Possible Solutions*, WRITTEN EVIDENCE AND DISCOVERY IN INTERNATIONAL ARBITRATION 365 (2009). Puts it as “It is not uncommon that, by the end of the procedure, when it has to deliver its award, the arbitral tribunal has received a great number and variety of documents and files that may be composed of thousands, hundreds of thousands and sometimes millions of pages of documents in the form of: written submissions (often two rounds of submissions before the hearing and one or two rounds of post-hearing submissions thereafter; and in many cases additional submissions on specified issues of substance or procedure); many folders of documentary evidence, often with translations; folders with legal authorities; witness statements, often followed by rebuttal statements; demonstrative exhibits; correspondence on procedural or other interlocutory matters, often extensive writings on controversial points; and transcripts of the hearing(s).”

<sup>526</sup> *Id.* ; Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT’L ARB. 575 (2006).; Pierre Tercier, ‘The Role of the Secretary to the Arbitral Tribunal’ pgs 543-544 in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION, (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014).

Empirical surveys over the last decade confirm this view. In a 2012 survey conducted by QMUL [hereinafter, '2012 QMUL Survey'] found that Tribunal Secretaries were appointed on an average 35% of ICA proceedings with those with civil law background showing greater disposition of employing them in about 46% of arbitrations as opposed to common law background.<sup>527</sup> Similarly, regional disparities were reported with their use being most common in Latin America with 62% respondents using them to only 23% and 26% in North America and Asia respectively.<sup>528</sup>

While, the above presents the snapshot of the frequency of employing Tribunal Secretaries but, they do not reveal in and of themselves, the familiarity within the ICA community of their usage. That is, how does their employment or non-usage translate into experience of among the ICA community as a whole. Here, Partasides and others [hereinafter, 2012 Survey] found that over 95% of responses supported appointment of Tribunal Secretaries with 94.8%, 57.7% and 58.8% of responses reasoning it on the basis of "support to the chairperson/arbitral tribunal", "sav[ing] time" and "reduc[ing] costs" respectively.<sup>529</sup>

Similarly, in QMUL Survey, 2015 [hereinafter, QMUL 2015 Survey], over 71% of the respondents viewed the role of Tribunal Secretaries positively with only 9% respondents considering that they were not useful on the basis that their use enhanced efficiency of the arbitral proceedings.<sup>530</sup>

These results were replicated in another 2015 Survey [hereinafter, BLP 2015 Survey] conducted by indicating that most of the participants had a positive perception for improving efficiency and costs associated with the tribunal.<sup>531</sup> More specifically, 74% agreed that tribunal secretary would positively impact the organizational and procedural efficiency, 77% agreed that tribunal secretary would lead to savings in costs because tribunal would be less involved with administrative tasks and 53% agreed that tribunal would have greater time to focus on judgment and decision-making.<sup>532</sup> In another empirical survey involving twenty-two prominent

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<sup>527</sup> Paul Friedland and Stavros Brekoulakis, *supra* note 322. pgs 10-12

<sup>528</sup> *Id.* pgs 10-12

<sup>529</sup> Constantine Partasides, Niuscha Bassiri, et al., 'Arbitral Secretaries', pg 342 in Albert Jan Berg, *International Arbitration: The Coming of a New Age?* (2013).

<sup>530</sup> Paul Friedland and Loukas Mistelis, *supra* note 115. pg. 42

<sup>531</sup> Research based report on the use of tribunal secretaries in international commercial arbitration, *supra* note 422. pgs 8-9.

<sup>532</sup> *Id.* pg 8

international arbitrators conducted jointly by International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association also concluded that Tribunal Secretaries, when properly employed, can be beneficial in large and complex international arbitrations by enhancing efficiency of the arbitration and reducing the workload of the tribunal.<sup>533</sup> This assessment also fits with the observation of Pierre Tercier that tribunal secretaries are more frequently employed in larger and complex arbitration because it made the task of tribunal to focus on decision-making easier.<sup>534</sup>

In other words, to use the findings of QMUL 2012 Survey, even if 35% ICA proceedings have their appointments<sup>535</sup> but it doesn't translate as a siloed experience where only 35% of ICA community has experienced them in proceedings but rather, its practice has diffused and come to be acknowledged as providing advantage within the ICA community. The Young ICCA survey of 2012 confirmed this where 95% of the respondents approved the use of tribunal secretaries.<sup>536</sup>

This sentiment was shared among the interviews with judicialization being the key reason behind having tribunal secretaries.<sup>537</sup> For instance, an arbitrator with three decades of experience<sup>538</sup> pointed out that currently arbitration cases have far more evidence than an ordinary Court proceedings. Similarly, another senior arbitrator also agreed with this assessment that contemporaneous arbitrations have become far more complex with some running into thousand pages of documentation.<sup>539</sup> Also, for those practitioners who only act as arbitrators, the needs of running the business requires having a certain minimum number of cases that in turn requires assistance with maintaining the record.<sup>540</sup>

In effect, what the empirical surveys and perspective of arbitrators demonstrate that the contemporaneous practice of arbitration, with increase in complexity as well as greater judicialization, presents a need for more efficient division of labor in order to free up the

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<sup>533</sup> Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 526.

<sup>534</sup> Pierre Tercier, ‘The Role of the Secretary to the Arbitral Tribunal’ pgs. 531-554 in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 526.

<sup>535</sup> QMUL Survey 2012 pgs. 10-12

<sup>536</sup> YOUNG ICCA GUIDE, *supra* note 388. Pgs. 2, 55.

<sup>537</sup> Code: Why, Interviewees # 4, 6, 9

<sup>538</sup> Interviewee # 4

<sup>539</sup> Interviewee # 6

<sup>540</sup> Interviewee # 9

arbitrators to focus on substantive issues.<sup>541</sup> Tribunal secretaries by taking over the logistical and administrative tasks, like setting up a conference call for a case management conference, addressing logistical issues such as court reporting, translators, hearing venues, catering and travel coordination, and provide detailed guidance to the parties in procedural orders play a crucial role in enabling the arbitrators to focus on the arbitration proceedings itself.<sup>542</sup> In cases of high complexity and value, tribunal secretary can help ensure that the arbitration proceeds smoothly and efficiently.<sup>543</sup> Additionally, their use may help minimizing guerrilla tactics in the arbitral process by ensuring that everyone is aware of and agrees to the secretary's role and that the secretary is aware of the limits of their tasks.<sup>544</sup>

To sum up, the role of tribunal secretary is one of the solutions and thus, pushed further by judicialization of ICA.<sup>545</sup> Pierre Tercier put it pithily, “years ago, it was common – and is still possible – for arbitrators to perform the entirety of the their tasks on their own, recent trends and professional developments have made assistance indispensable”<sup>546</sup>.

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<sup>541</sup> JENSEN, *supra* note 149.; Constantine Partasides, Niuscha Bassiri, et al., 'Arbitral Secretaries', pg 329-330 in Berg, *supra* note 529.; Katia Fach Gómez, *The Duty of Personal Diligence and Integrity*, in KEY DUTIES OF INTERNATIONAL INVESTMENT ARBITRATORS 123 (2019), [http://link.springer.com/10.1007/978-3-319-98128-4\\_4](http://link.springer.com/10.1007/978-3-319-98128-4_4) (last visited Mar 7, 2023). At pages 128-129.; Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 526.; Pierre Tercier, ‘The Role of the Secretary to the Arbitral Tribunal’ at pg 545 put it simply as “letting the arbitrator delegate simpler tasks to assistants will make the proceedings more efficient and therefore in principle less costly, especially where arbitrators charge on an hourly basis” in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 526.

<sup>542</sup> Jan K. Schäfer, *supra* note 205. at pg 10 ; Partasides, *supra* note 425. At pg 158, “Not intended to denote a lesser importance, this simply acknowledges the reality there are certain formal or uncontroversial parts of an award that may not implicate the arbitrator’s decision-making”

<sup>543</sup> Maarten Draye and Emily Hay, *supra* note 174. Pg. 81 put it as “In cases of a certain complexity and value, arbitral tribunals will therefore benefit from the assistance of a so-called tribunal secretary or arbitral secretary to ensure that the arbitration can proceed smoothly and efficiently.” ; Schneider, *supra* note 525.

<sup>544</sup> AHUJA, *supra* note 112. pg 153.

<sup>545</sup> For instance, refer, Zachary Douglas, ‘The Secretary to the Arbitral Tribunal’ pgs 87-92 in INSIDE THE BLACK BOX, *supra* note 124.; J. Ole Jensen, *Aligning Arbitrator Assistance with the Parties’ Legitimate Expectations: Proposal of a ‘Traffic Light Scale of Permissible Tribunal Secretary Tasks*, ’ 38 ASAB 375 (2020); Schroeder and Junge, *supra* note 461.; ARBITRAL SECRETARIES, *supra* note 475.; PHILIPPE FOUCARD & BERTHOLD GOLDMAN, FOUCARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (1999). Para 1250.

<sup>546</sup> Pierre Tercier, ‘The Role of the Secretary to the Arbitral Tribunal’ pgs 553-554 in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 526.

Thus, the discussion of judicialization becomes the discursive background in which the ICA community articulates the challenges of quality, time and costs.<sup>547</sup> The tribunal secretary within this discussion emerges as a role that provides solution to this problem.<sup>548</sup>

### 5.3.2. BEYOND THE “FLAWLESS LEGAL PROSE WITH A FOUNTAIN PEN”

The next section, continues ahead to build on the practice of Tribunal Secretary, that is, this appointment or the post has become integral to and an accepted practice because of their historical usage as well as their widespread acceptance.<sup>549</sup> That is, while judicialization has indeed contributed to their appeal, the argument presented here is that the resulting familiarization with their presence and acknowledgement of their role has caused within ICA community to accept Tribunal Secretary as an integral part of the practice of ICA.<sup>550</sup>

The consequence of this argument is that the question of what to delegate and what scope of delegation builds on this engagement as a realistic one, that is acknowledging that they are

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<sup>547</sup> Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is It?*, 32 JOURNAL OF INTERNATIONAL ARBITRATION 689 (2015).; Joerg Risse, *supra* note 111.; Anne Véronique Schläpfer and Marily Paralika, *supra* note 111.; Park, *supra* note 111.

<sup>548</sup> More specifically, Kaczmarczyk and Lam, *supra* note 81. At 717 Has defined values as one of the triads being, “Values are typically much less variable and constitute the core of individual and collective identities. Their existence may be revealed through the analysis of attitudes, their structure, hierarchy, and distribution across a culture. Values define what people respect and what legitimizes the existence of practices and institutions.” Also, Emanuel Adler & Peter M Haas, *Epistemic Communities, World-Order, and the Creation of a Reflective Research-Program-Conclusion*, 46 INTERNATIONAL ORGANIZATION (1992). State at pg 371, “We try to show here that expectations in international politics come from interpretive processes involving political and cultural structures, as well as from institutions “dedicated to defining and modifying values and the meaning of action.””; Also, Bianchi, *supra* note 148. States, “Ultimately, epistemic communities are also in charge of the social identity of the discipline and the profession. They discharge important communal functions insofar as they represent shared beliefs and interests. By putting forward a common vision of the world, epistemic communities shape the perception of social agents and determine the fundamental tenets of the discourse.”

<sup>549</sup> More precisely, Kaczmarczyk and Lam, *supra* note 81. At pg. 717 defines it as, “Practices are often not reflected upon or may even be unconscious, when a person does not realize the meaning of an action and keeps to it out of habit. Certain practices may be emulated or enforced by the conditions of action.”; As Bianchi discussed the centrality of practice to understand law, “Law is whatever people in their social practices identify and treat as law. This is yet another approach to legal pluralism, as it does not presuppose a unity conception of law which can then be broken down into different subsystems or legal orders. In this view of pluralism, there may be different phenomena to which people attach the label ‘law’. … Ultimately, it is social practices and social conceptions that determine what people consider as law.” At pg 230 in ANDREA BIANCHI, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING (First edition ed. 2016).

<sup>550</sup> Refer Chapter 7 for further discussion on ICA professionalization including that of learning and socialization outcomes.; Pierre Lalive, *Inquiétantes Dérives de l’arbitrage CCI*, 13 ASA BULL. 634 (1995). Pierre Tercier, “The Role of Secretary to the Arbitral Tribunal” in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 526. For instance emphasize the centrality of this role as part of learning ICA with Tercier concluding it simply as, “the task of educating the next generation remains one of the essential tasks of an arbitrator”

reality and will remain so, rather than seeing a Tribunal Secretary as an extraordinary or an exceptional presence within ICA.<sup>551</sup>

Zachary Douglas had argued the need to look at the arbitral tribunal beyond “the idea of the lone arbitrator sitting among a mass of files and papers in a stuffy office somewhere churning out flawless legal prose with a fountain pen.”<sup>552</sup> In effect, he was arguing [and repeating what has been argued for atleast three decades] for a realistic engagement with the question of arbitral decision-making, including, reliance on the use of Tribunal Secretaries.<sup>553</sup> As one senior arbitration practitioner put it that it is a fantasy island to think that contemporary arbitration practice can be understood through the myth of lone arbitrator.<sup>554</sup>

The 2012 Survey also identified the tendency to call for restricting the role of Tribunal Secretary to be strictly limited to administrative support while there being little secret as to the actual practice in which arbitrators relied on their assistance for broader tasks as “hypocrisy”.

<sup>555</sup> They relying on the results of the survey, which revealed that a significant percentage of

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<sup>551</sup> For instance BERGER, *supra* note 119. Paras 27-11 to 27-19 prefers a granular understanding of tasks as opposed to outright prohibition of Tribunal Secretaries beyond purely administrative tasks.; Similarly, Pierre Tercier, “The Role of the Secretary to the Arbitral Tribunal” pg 545-548 in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 526. Puts the definition of the role of the Tribunal Secretary as based on defining the tasks the entrusted to them in order to locate the proper extent and limitations of the duties of Tribunal Secretary, including, research assistance, assistance in drafting and working on the case proceedings and also at pg. 536, “It is, in fact, impossible to define the role of a secretary or assistant without first recognizing that it is legitimate for the arbitrators to have recourse to their assistance.”; Ottarndt Glossner, *Sociological Aspects of International Commercial Arbitration*, 10 INT’L BUS. LAW. 311 (1982). Recognizes the presence of Tribunal Secretary as part of arbitral practice in ICA as far back as 1982.

<sup>552</sup> INSIDE THE BLACK BOX, *supra* note 124. Pg. 89

<sup>553</sup> Zachary Douglas in *Id.* ; Constantine Partasides, Niuscha Bassiri, et al., 'Arbitral Secretaries' Berg, *supra* note 529. ; Richard Mosk, 'Arbitral Deliberations' pg. 495 in PRACTISING VIRTUE, *supra* note 148.; Constantine Partasides, 'Secretaries to Arbitral Tribunals' pgs. 84-88 in PLAYERS' INTERACTION IN INTERNATIONAL ARBITRATION, (Bernard Hanotiau, Alexis Mourre, & ICC Institute of World Business Law eds., 2012).; Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 526. Pgs 585-586, “There also appears to be a widespread perception among international arbitrators that duplicity exists between the public assertions that these arbitrators disapprove of the heavy reliance upon secretaries and their private approbation of them.”; Felix Dasser and Emmanuel O. Igbokwe, 'The Award and the Courts, Efficient Drafting of the Arbitral Award: Traditional Ways Revisited – Lesson Learned from the Past?' at pgs 298-299 in CHRISTIAN KLAUSEGGER ET AL., AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2019 (2019) (2019).: Pierre Lalive put it bluntly as, “Il n'en reste pas moins que, par la nature même des choses, ce savoir livresque ou purement documentaire ne saurait remplacer en aucune manière l'expérience directe, concrète et vécue de la réalité arbitrale. Or celle-ci ne s'acquierte qu'après de longues années de pratique (et souvent, d'abord ... comme secrétaire de tribunal arbitral !).” in his response against attempts to silo Tribunal Secretaries to purely administrative duties by ICC in 1995. [“this bookish or purely documentary knowledge cannot in any way replace the direct, concrete and lived experience of the arbitral reality. This can only be acquired after many years of practice (often, first as a secretary of an arbitral tribunal!).”] in Lalive, *supra* note 550.; Also, BERGER, *supra* note 119. Paras 27-15 to 27-18 writes against the dogmatic approach restricting Tribunal Secretaries to merely administrative tasks as unrealistic.

<sup>554</sup> Interviewee # 4

<sup>555</sup> Constantine Partasides, Niuscha Bassiri, et al., 'Arbitral Secretaries', pg 327 in Berg, *supra* note 529.

respondents, specifically over 77%, reported that Tribunal Secretaries were involved in drafting procedural orders, even though only 60% believed that this should be their responsibility. More starkly, while over 62% and 69% of respondents acknowledged the involvement of Tribunal Secretaries in analyzing parties' submissions and drafting parts of the award, respectively, but only 38.7% and 45.2% agreed that these tasks should be delegated to Tribunal Secretaries.<sup>556</sup>

To put it simply, they argued that dogmatism of administrative tasks only is counterproductive when analysing the role of Tribunal Secretaries in ICA but rather the inquiry would benefit from delving into the specifics of their functions that a more precise and coherent understanding of the permissible scope of their duties can be developed.<sup>557</sup>

Thus, the argument in essence, is not merely that appointing Tribunal Secretaries is one of the many solutions available to the problem of judicialization but has also been the result of these pressures of judicialization.<sup>558</sup> That is, the practice<sup>559</sup> of ICA today has embraced the use of

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<sup>556</sup> Constantine Partasides, Niuscha Bassiri, et al., 'Arbitral Secretaries', pg 327 in *Id.*

<sup>557</sup> Constantine Partasides, Niuscha Bassiri, et al., 'Arbitral Secretaries', pg 332 in *Id.*; JENSEN, *supra* note 149. Whose book's central argument is that "the best way to achieve such transparency is to move towards an institutionalization of the position of the tribunal secretary, ie a position in the arbitral process that is both recognized and clearly defined. If institutionalized, all stakeholders in an international arbitration know what to expect from a tribunal secretary and how to discuss her involvement with the arbitral tribunal."; Also, Pierre Tercier, "The Role of the Secretary to the Arbitral Tribunal" pg 536 in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 526.

<sup>558</sup> For instance, FOUCARD AND GOLDMAN, *supra* note 545. Comment that "it is now common in large international disputes to follow the Swiss practice of allowing the arbitral tribunal to appoint a secretary"; Glossner, *supra* note 551.

<sup>559</sup> More specifically, Kaczmarczyk and Lam, *supra* note 81. Where they define practice as, "By practices, we understand what people really do, irrespective of the values they have in mind. Practices are often not reflected upon or may even be unconscious, when a person does not realize the meaning of an action and keeps to it out of habit. Certain practices may be emulated or enforced by the conditions of action. Sometimes, actors may just anticipate an action to be expected by others and undertake it by virtue of solidarity, loyalty, or trust. Sometimes, an action that occurs by chance proves to be effective and finds its way into everyday practices." Also, refer Robert Henry Cox & Daniel Béland, *Valence, Policy Ideas, and the Rise of Sustainability: Valence and Sustainability*, 26 GOVERNANCE 307 (2013). Who argue that "The basic form of this argument is that ideas have valence that makes them attractive or aversive. The attractiveness or aversiveness of policy ideas helps to shape or block a path for policy change. When they are attractive, or have positive valence, ideas create powerful emotional dispositions for some types of policy options and preclude consideration of others. Policy entrepreneurs, or the people who advocate for, and carry out policy change, are effective when they understand and appreciate the valence of policy ideas. Skilled policy entrepreneurs have an innate ability to detect public moods and the valence of policy ideas. They then are able to frame policy options by matching these ideas and moods." In effect that the ideas that are adopted widespread and translated into specific practice occur because of positive disposition towards them.; Further refer TWINING, *supra* note 78. Pg 316 who put it simply as "Resort to alternative dispute resolution, including domestic and international arbitration, is in part motivated by the fact that many such proceedings are not in public and in important respects may be protected by strict requirements of confidentiality. ... Understanding law in a broad sense requires knowledge of normative and non-state legal orders 'in action' and their inter-relations ('interlegality'). Even understanding a state legal system involves knowledge of its relationship to other co-existing normative orders, whether or not they are characterised as 'legal'. This inevitably involves penetrating beneath the 'surface' of formal statements of legal rules."

Tribunal Secretaries beyond the sole administrative tasks<sup>560</sup> and this trend has only been furthered by judicialization of ICA.

Underlying this is the reality that the complexity and size of modern arbitration cases, featuring teams of counsel representing the parties have significantly augmented the quantity of documentary evidence submitted in arbitration or “Paper Tsunamis”.<sup>561</sup> With all this evidence that can include tens of thousands of pages of exhibits and dozens of fact witness statements and expert reports, exceeding the ability of arbitral panel to personally review the entire file and render an award within the expected time frame.<sup>562</sup> In as much, these cases require a considerable amount of administrative, organizational, documentary, and procedural work where synthesis of large documentary record and addressing of procedural issues arise throughout the proceedings whose importance is exacerbated by the fact that arbitrators also have other simultaneous professional activities like attorney, academics or industry specialists.<sup>563</sup>

To put it differently, the favorable view of Tribunal Secretary is exemplified in the defence of their usage where it is argued that parties who themselves employ teams of attorneys cannot reasonably expect arbitral tribunal to handle the entire burden of review unassisted.<sup>564</sup> Schneider referred it as a striking imbalance where the parties often have large teams of lawyers, claims consultants, accountants, and experts to assist them with their claims while, the arbitrators were expected to handle this same volume of evidence alone and without any assistance.<sup>565</sup> Tercier also argued that demanding arbitrators to prepare everything on their own

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<sup>560</sup> The Debate on the 1995 ICC Note between Lalive and Schwartz is discussed subsequently in this section to present that a large number within ICA community have over the last three decades rejected the extremely restrictive “administrative” role for Tribunal Secretaries. Specifically, Lalive, *supra* note 550; Pierre Lalive, *Un Post-Scriptum et Quelques Citations*, 14 ASA BULL. 35 (1996).; Constantine Partasides, ‘Secretaries to Arbitral Tribunal’ at pg 84 in PLAYERS’ INTERACTION IN INTERNATIONAL ARBITRATION, *supra* note 553.

<sup>561</sup> Schneider, *supra* note 525.; Schroeder and Junge, *supra* note 461. Pgs 22-23;

<sup>562</sup> Miss Moneypenny, Kluwer Arbitration Blog; Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 526.; Pierre Tercier, ‘The Role of the Secretary to the Arbitral Tribunal’ pgs. 543-544 in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 526.

<sup>563</sup> Maarten Draye and Emily Hay, ‘The Arbitral Secretary: Unnecessary Nuisance or Unsung Hero – A Practitioner’s View’, at pg 81 and Jan K Shafer pg. 10 in ARBITRAL SECRETARIES, *supra* note 475.

<sup>564</sup> Miss Moneypenny, Kluwer Arbitration Blog; Schneider, *supra* note 525.

<sup>565</sup> *Id.* States, “One of the most serious problems resulting from this often overwhelming wave of paper in large arbitration cases, for which the term “tsunami” does not seem exaggerated, arises at the level of the arbitrators. There is a striking imbalance in document-intensive international arbitration cases. On the one hand, the parties in these cases are often assisted by large numbers of lawyers of all levels and with different qualifications and by claims consultants, accountants and experts in different fields of learning. On the other hand, one or, in cases of

creates additional risks of errors where important facts and information might get overlooked on account of this increased in volume of the parties' submissions.<sup>566</sup> This gains especial relevance because, while the pool of arbitrators can be theoretically inexhaustive but the reality of practice suggests that there is a limited number of arbitrators known for their expertise leading to repeat appointments for this smaller set of arbitrators.<sup>567</sup>

And as the proceedings have become more complex, the parties in practice also too often have shown preference for arbitrators that have strong support systems as opposed to solo practitioners.<sup>568</sup> Shafer in making a business case for Tribunal Secretaries argues that the support they provide enables them to take on greater number of cases as well as be able to focus on the key issues while delegating the time-consuming tasks that are not central to arbitral decision-making to Tribunal Secretaries recognizes the inherent role played in practice.<sup>569</sup> Thus, this is also an incentive for the parties as well as because, in its absence the same would

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some complexity, three individuals are expected to perform their duties as arbitrators alone and without any assistance.”

<sup>566</sup> Pierre Tercier, “The Role of the Secretary to the Arbitral Tribunal” pg 544 in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 526.

<sup>567</sup> DEZALAY AND GARTH, *supra* note 84. Pg 10 Identified this as arbitration mafia or club where they quote an interviewee, “It is a club. They nominate one another. And sometimes you’re a counsel, and sometimes you’re arbitrators”; MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE (2010). At pg. 255 humorously note, “There is a joke that ‘MAFIA’ stands for Mutual Association For International Arbitration”; Jensen, *supra* note 420. Pg 4, “At least in theory, there is an unrestricted number of international arbitrators (because there are hardly any formal qualification requirements for arbitrators) and a restricted number of new cases (as any arbitrator may decline appointment if his or her docket is ‘full’). This structural difference is not levelled off by the fact that, in reality, a quite similar need for assistance exists in international arbitration: Parties tend to opt for the same overburdened individuals, as they are looking for the best-qualified individuals with the most experience – or, in the case of an opportunistic respondent, intend to slow down proceedings”; Morton, *supra* note 128. Discussing the problem of arbitrator’s availability.; Also, Catherine A Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT’L L. REV. 957 (2004).; Susan D Franck et al., *The Diversity Challenge: Exploring the Invisible College of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429 (2014). Explore the question of diversity within the ranks of ICA community to show the prominence of a smaller set of individuals within the profession.: Jacomijn J van Harersolte-Van Hof, “Diversity in Diversity” at pg. 643 answers it as, “This leads to the question, where are we now, is an alarmingly small pool of arbitrators dominating the field and if so, is this jeopardizing the legitimacy and the efficacy of arbitration? To begin with the conclusion: yes, and yes.” In ALBERT JAN VAN DEN BERG, LEGITIMACY: MYTHS, REALITIES, CHALLENGES (2015).

<sup>568</sup> Schroeder and Junge, *supra* note 461. Pgs 22-23; Constantine Partasides, Niuscha Bassiri, et al., 'Arbitral Secretaries', pgs. 329-330 in Berg, *supra* note 529.

<sup>569</sup> Jan K. Schäfer, 'The Business Case for and against Tribunal Secretaries', pgs 9-12 in ARBITRAL SECRETARIES, *supra* note 475.; Also, similar conclusion in Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 526. At pg 591.

have to be performed either by arbitrator or the parties' legal team and thus, also pushing the overall costs of the arbitration.<sup>570</sup>

Ole Jensen too has emphasized the same especially in case where the arbitrator is paid on hourly basis that the appointment of Tribunal Secretary reduces the overall costs for the arbitration because some of the tasks that otherwise would be done by the arbitrator could be carried out by the Tribunal Secretary and thereby, decreasing the overall costs of the arbitration.<sup>571</sup> Similarly, all this is underscored by an acknowledgement that third-party assistance is common practice among arbitrators with arbitrators that several tasks that are not personal to arbitrator's mandate are carried out by informal support<sup>572</sup> including, administrative support or with legal research of a restrictive nature<sup>573</sup> and delegate all such tasks that do not leave any room for discretion.<sup>574</sup>

Though, without downplaying the concerns around undisclosed reliance on secretarial use<sup>575</sup>, the acknowledgement of this practice is revealed in greater transparency by many senior arbitrators in appointing Tribunal Secretaries.<sup>576</sup> In turn, this too has led to a greater acceptance by the parties that not every sentence in the award would have to be drafted by the arbitrators.<sup>577</sup>

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<sup>570</sup> Jan K. Schäfer, 'The Business Case for and against Tribunal Secretaries', pgs 9-12 in ARBITRAL SECRETARIES, *supra* note 475.

<sup>571</sup> JENSEN, *supra* note 149. Para 2.15; Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 526.

<sup>572</sup> Jensen, *supra* note 545. Pgs 379-380; Pierre Tercier, 'The Role of the Secretary to the Arbitral Tribunal' at pg 550 puts it as, "the arbitral tribunal is also authorized to turn to "informal assistants for help" in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 526.

<sup>573</sup> Schroeder and Junge, *supra* note 461. Pg 38

<sup>574</sup> Jensen, *supra* note 420.

<sup>575</sup> For instance, refer Schroeder and Junge, *supra* note 461. At pg 21 footnote 3 Narrating a personal recollection regarding undisclosed secretary and similarly, Jean Pierre-Fierens, 'An Arbitrator's View on the Expected Assistance from the Arbitral Tribunal's Secretary', at pg. 118 recounts a personal experience of such a nature in ARBITRAL SECRETARIES, *supra* note 475.

<sup>576</sup> Constantine Partasides, 'Transparency and the role of Arbitral Secretaries' at pgs 1-8 in ARBITRAL SECRETARIES, *supra* note 475.

<sup>577</sup> Refer Douglas Zachary pgs 87-89 in INSIDE THE BLACK BOX, *supra* note 124. Stating, "It is interesting that some of the very senior arbitrators, who we know rely upon junior assistants quite substantially to draft their awards, are still appointed time and time again. This is happening because the senior arbitrators I have in mind are being transparent about it and some users of arbitration are prepared to accept that they will not have the assurance of the chairperson or the co-arbitrators drafting every sentence of the award. They are prepared to accept that because they know it will lead to a faster resolution of their dispute."; Also, Pierre Tercier, 'The Role of the Secretary to the Arbitral Tribunal' at pg. 547 in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION, *supra* note 526. Puts it simply as, "there is no reason why the arbitrators cannot ask for some kind of assistance in the drafting of the award. To the extent that the arbitral tribunal keeps control over the drafting process as well as the specific content of the draft and ensures that it duly reflects its deliberation and its reasoning, the help of an assistant or secretary should not give rise to concerns."; Also, Jean Pierre-Fierens, 'An Arbitrator's View on the Expected Assistance from the Arbitral Tribunal's Secretary', at pg. 116 in ARBITRAL SECRETARIES,

Pointedly, the 2012 Survey established the widespread acceptance of this practice with 95% of the respondents agreeing with the use of the arbitral secretaries with the authors concluding that, “the use of arbitral secretaries in the arbitral process appears to be well-supported by the arbitral community.”<sup>578</sup> The QMUL 2015 Survey further confirmed this finding with over 97% of the respondents acknowledging being aware of their use and 82% of respondents being directly involved in cases where Tribunal Secretaries were employed.<sup>579</sup> The BLP 2015 Survey also found 73% of arbitrators acknowledging an overall beneficial outcome from appointment of Tribunal Secretaries.<sup>580</sup>

The empirical surveys quoted above demonstrate not just familiarity and advantageousness but also an acknowledgment that it is part of the ICA practice. Richard Mosk defending the presence of Tribunal Secretaries during arbitral deliberations put it simply as “an extension of the arbitrator for whom he or she works”.<sup>581</sup> Partasides also similarly argued that the role for a Tribunal Secretary, whether conducting legal research or providing first drafts, is explicitly envisaged in practice of national Courts as well as within ICA itself.<sup>582</sup> Having himself acted as one, he argued for more transparency in recognizing their employment and usage within ICA community including, the need for aligning what is presented to the public about their use and their actual use.<sup>583</sup> Ole Jensen has analogized Tribunal Secretaries as ‘Sherpas’ to the arbitrators providing a multitude of support beyond that of proceedings, including publishing

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<sup>578</sup> Constantine Partasides, ‘Secretaries to Arbitral Tribunal’ at pg. 85 in PLAYERS’ INTERACTION IN INTERNATIONAL ARBITRATION, *supra* note 553.; Felix Dasser and Emmanuel O. Igbokwe, ‘The Award and the Courts, Efficient Drafting of the Arbitral Award: Traditional Ways Revisited – Lesson Learned from the Past?’ pgs 298-299, “the idea that arbitrators should personally draft their awards never really gained a foothold in international arbitration practice, despite decades of insistence by some.” in KLAUSEGGER ET AL., *supra* note 553.

<sup>579</sup> Constantine Partasides, Niuscha Bassiri, et al., ‘Arbitral Secretaries’, pgs. 330-331 in Berg, *supra* note 529.

<sup>580</sup> Paul Friedland and Loukas Mistelis, *supra* note 115. pg. 42

<sup>581</sup> Research based report on the use of tribunal secretaries in international commercial arbitration, *supra* note 422. pg. 9

<sup>582</sup> Richard Mosk, Arbitral Deliberations pg. 495 in PRACTISING VIRTUE, *supra* note 148.; However, for a contrary view refer Thomas Clay, *Le Secrétaire Arbitral*, REVUE DE L’ARBITRAGE 931 (2005).

<sup>583</sup> Constantine Partasides, ‘Transparency and the role of Arbitral Secretaries’, pgs 4-8 in ARBITRAL SECRETARIES, *supra* note 475. “Some of you will know that I have been thinking and writing about the subject of arbitral secretaries for far too long. At the time I wrote my first article on the subject, now almost 20 years ago, I was doing a lot of arbitral secretary work myself. But what I didn’t expect is that some 20 years later, I would be invited to pick up the metaphorical arbitral secretary pen again, although now from the vantage point of someone more likely to use a secretary than be a secretary. .... this applies to the existence and role of the arbitral secretaries in our process. No more ‘secret secretary’. No more saying a secretary is only doing one thing, but doing many others.”

articles, in a manner creating an effective support so as to enable the arbitrators to concentrate their attention at core issues.<sup>584</sup>

Similarly, arbitrators too have argued for a more pragmatic approach towards the reliance on Tribunal Secretaries.<sup>585</sup> Fierens in his discussion on how he worked with Tribunal Secretaries emphasized the importance of relying on the junior associates at his firm on account of physical proximity that enabled both ease of access as well as supervision.<sup>586</sup> Claude Reymond, a leading arbitrator, also acknowledged the importance of learning from actual practice, including first working as a Tribunal Secretary for leading arbitrators.<sup>587</sup> Historical examples also abound, including that of Pierre Lalive and Gunner Lagergren who had acted in similar capacity at an earlier stage of their career.<sup>588</sup>

### 5.3.3. “LIMITED TO ADMINISTRATIVE TASKS”, ICC NOTE, 1995 AND ICC PRACTICE

Before proceeding ahead, it is necessary to look at the practice of ICC. This gains in importance not only because of the centrality of ICC to arbitration but also that it has maintained the most restrictive rules for the role of tribunal secretaries.<sup>589</sup> Before proceeding to the contemporaneous position of ICC, it is necessary to look at the debate in 1995 between the senior arbitrator, Pierre Lalive and then Secretary-General of ICC, Eric Schwartz. The utility of this historical detour lies in their respective positions that have remained constant with ICC rules.

The debate around the ‘Note concerning the appointment of Administrative Secretaries by Arbitral Tribunals’ [hereinafter, ICC Note, 1995] issued in 1995 by the ICC Secretariat is

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<sup>584</sup> JENSEN, *supra* note 149. Paras 2.23-2.24

<sup>585</sup> Partasides has regularly rejected the situation where the assertions by the arbitrators did not correspond to the reality as well as has welcomed a greater openness about the discussion of the role of Tribunal Secretary both by themselves as well as their place within ICA practice. Refer Constantine Partasides ‘Transparency and the role of Arbitral Secretaries’ in ARBITRAL SECRETARIES, *supra* note 475. And Constantine Partasides, ‘Secretaries to Arbitral Tribunal’ in PLAYERS’ INTERACTION IN INTERNATIONAL ARBITRATION, *supra* note 553.

<sup>586</sup> Jean Pierre-Fierens, ‘An Arbitrator’s View on the Expected Assistance from the Arbitral Tribunal’s Secretary’, pg 111 in ARBITRAL SECRETARIES, *supra* note 475.

<sup>587</sup> C. Reymond, *The President of the Arbitral Tribunal*, 9 ICSID REVIEW 1 (1994). States, “With respect to these two points, one will inevitably have to draw on experience: either that of the author (who had the privilege of working with greatly respected arbitrators from whom he learned much, first as secretary of arbitration tribunals, then as an arbitrator) or that of other arbitrators. It is from the actual practice of arbitration that one is able to gain the most valuable knowledge.”

<sup>588</sup> DEZALAY AND GARTH, *supra* note 84. Pages 20-22.

<sup>589</sup> Paul Di Pietro, *supra* note 349.

illustrative.<sup>590</sup> Very briefly, in 1995, the ICC Secretariat issued the ICC Note, 1995 to serve as a guide for the use of the Tribunal Secretaries. Essentially, it attempted to tackle three areas of practice, namely - first, emphasis of parties' consent before the appointment of Tribunal Secretary, second, remunerating of Tribunal Secretary as deduction from the fees of the arbitrator and third, restriction of the duties "limited to *administrative tasks*" laconically expressed as prohibition against "becoming involved in the decision-making process of the tribunal or expressing opinions or conclusions with respect to the issues in dispute".<sup>591</sup>

Pierre Lalive, a leading arbitrator by then<sup>592</sup>, responded to this note in two articles to establish that the Tribunal Secretary had by then been an already established as part of the ICA practice.<sup>593</sup> He argued against it being seen solely as a practice of one jurisdiction, namely, Switzerland but that it was a common practice among arbitrators of multiple nationalities, who favored it as a cost-saving measure for the arbitration as a whole, time-saving measure for the arbitrators who could focus on the key questions before them and finally, as a training for the future professionals.<sup>594</sup> In crux, Lalive was arguing that the practice of employing Tribunal Secretary had become part of the practice by then with both a wide-appeal and usage.<sup>595</sup> To put it differently, besides the benefits in terms of efficiency<sup>596</sup> and learning for the appointed Tribunal Secretary<sup>597</sup>, he was essentially arguing for that the practice of Tribunal Secretary within the ICA community had come to be an accepted reality, that is, Tribunal Secretaries ought to be understood not merely on account of their regularity or lack thereof but as an

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<sup>590</sup> Appendix 4d in YVES DERAINS & ERIC A SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION (2005). Pgs 421-422.

<sup>591</sup> Appendix 4d in *Id.*

<sup>592</sup> Elliot Geisenger tracks Pierre Lalive's career succinctly in Elliott Geisinger, *From the ASA President, In Memoriam Professor Pierre Lalive*, 32 223 (2014). Including his lecture at Hague Academy in 1967 on International Commercial Arbitration.

<sup>593</sup> Lalive, *supra* note 550; Lalive, *supra* note 560.

<sup>594</sup> Lalive, *supra* note 550; Lalive, *supra* note 560.

<sup>595</sup> Lalive, *supra* note 550; Lalive, *supra* note 560. Put its simply as, "On ne trouve pas un mot en effet (ni dans la "Reply", ni dans la "Note du Secrétariat", ni dans le Rapport Schwartz du 17 novembre 1995) sur la grande majorité des cas, où un secrétaire, nommé par le Tribunal avec le plein consentement des parties, s'est révélé des plus utiles, comme l'avait compris le juge fédéral André Panchaud, auteur du Concordat Suisse, et comme le savent les praticiens de nombreuses nationalités." [In fact, not a word is found (neither in the "Reply", nor in the "Secretariat Note", nor in the Schwartz Report of November 17, 1995) on the vast majority of cases where a secretary, appointed by the tribunal with the full consent of the parties, has proven to be most useful, as understood by Federal Judge André Panchaud, author of the Swiss Concordat, and as known by practitioners of many nationalities.]

<sup>596</sup> Refer preceding sub-sections where Tribunal Secretary's role in view of judicialization has been discussed.

<sup>597</sup> Refer Chapter 6 for detailed discussion.

arbitral reality. To quote his own words where he argued it bluntly, “However, by the very nature of things, this bookish or purely documentary knowledge cannot in any way replace the direct, concrete and lived experience of the arbitral reality. This can only be acquired after many years of practice (often, first as a secretary of an arbitral tribunal!).”<sup>598</sup> In his response, Eric Schwartz, the then Secretary-General of ICC, responded with brevity to highlight that the remuneration was the central concern which the ICC Note, 1995 sought to ameliorate.<sup>599</sup>

This aspect of arbitral reality, that is, having become part of the ICA practice, would only be re-affirmed in subsequent years, for instance, Constantine Partasides in his highly cited article ‘The Fourth Arbitrator?’ similarly re-asserted against the ICC Note, 1995 as that “Views may vary on how best to finance and regulate the use of secretaries, but the place of secretaries in international arbitration ought today to be assured. … Ignoring current practice, the existing ICC Note has risked irrelevance”.<sup>600</sup> The obsolescence of the 1995 Note was conceded by Paul Di Pietro, the then Deputy Counsel with ICC Secretariat, when presenting the position of ICC Rules of 2017 at second Joint NAI – CEPANI Colloquium.<sup>601</sup>

The debate on the 1995 Note formed the backdrop where Partasides cited a discussion of Thomas Clay<sup>602</sup> with Pierre Lalive on this matter where Lalive argued that instances of excessive delegation were “extremely rare but constantly regurgitated”.<sup>603</sup>

Since then, ICC rules allow for both organizational as well as engagement with the records by the tribunal secretaries.<sup>604</sup>

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<sup>598</sup> The cited line is a machine generated translation, whose original reads, “Il n'en reste pas moins que, par la nature même des choses, ce savoir livresque ou purement documentaire ne saurait remplacer en aucune manière l'expérience directe, concrète et vécue de la réalité arbitrale. Or celle-ci ne s'acquierte qu'après de longues années de pratique (et souvent, d'abord … comme secrétaire de tribunal arbitral !).” in Lalive, *supra* note 550.

<sup>599</sup> Eric Schwartz, *On the Subject of Administrative Secretaries-A Reply by Mr. Eric Schwartz, Secretary General of the ICC Court*, 14 ASA BULL. 32 (1996). At pg. 33, “the Court's action, in this case, relates to one of its most important functions in the eyes of its users: i.e., fixing and controlling the fees and costs of the arbitrators.”

<sup>600</sup> Partasides, *supra* note 425.

<sup>601</sup> Paul Di Pietro, *supra* note 349. Pg 103

<sup>602</sup> Thomas Clay had finished his doctoral dissertation, Thomas Clay, *L'arbitre*, 2000. Where he briefly discussed the debate between Pierre Lalive and the 1995 Note who went on to establish his law firm, Clay Arbitration whose managing partner he still remains. Refer, <https://fr.linkedin.com/in/thomas-clay-01b9627> and <https://www.clayarbitration.com/>

<sup>603</sup> Partasides, *supra* note 425. Footnote 17 at pg. 150

<sup>604</sup> International Chamber of Commerce, *supra* note 434. Paras 223-225

### 5.3.4. TRIBUNAL SECRETARY AS AN INTEGRAL PART OF ICA PRACTICE

Empirical surveys too have acknowledged usage of Tribunal Secretary beyond the “limited to *administrative tasks*” and within it recognizing both their ability to contribute towards efficiency as well as being an accepted practice within the ICA community.<sup>605</sup> The 2012 QMUL Survey is a case in point that observed this contrast in practice where they found over 70% responded favorably for seeking assistance in drafting procedural and non-substantive parts of the award with what ICC Note, 1995 and its succeeding 2012 Note advised.<sup>606</sup> Indeed, Partasides remained a persistent critique of what he called *decalage* arguing for a realistic engagement with the role, and thus, the extent of duties of Tribunal Secretaries, reiterating their persistent presence with an empirical study in which over 95% respondents responded with positive disposition in employing Tribunal Secretaries.<sup>607</sup>

Eventually, Paul di Pietro<sup>608</sup> acknowledged the quick obsolescence of the ICC Note, 1995 on account of both greater usage among the arbitrators.<sup>609</sup> And though, he continued to hold the similar line of argument as Eric Schwartz did in 1990s that no form of drafting activity can be delegated by the arbitral tribunal while acknowledging that Tribunal Secretaries could play a more broader role by engaging in legal research or preparation of memoranda as provided for the new Note issued by ICC in 2017.<sup>610</sup> Ironically, as it so happened, Paul di Pietro had presented the ICC perspective at very same Joint NAI-CEPANI Colloquium where Constantine Partasides argued for greater transparency and the need to move beyond the un-realistic assessment of Tribunal Secretary as merely administrative and where Jean Pierre-Fierens, an arbitrator himself, disclosed the broad role that the Tribunal Secretaries play.<sup>611</sup>

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<sup>605</sup> For instance, Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 526. YOUNG ICCA GUIDE, *supra* note 388.

<sup>606</sup> Paul Friedland and Stavros Brekoulakis, *supra* note 322.; International Chamber of Commerce, *supra* note 434.

<sup>607</sup> Constantine Partasides, ‘Secretaries to Arbitral Tribunals’ at pg. 87 in PLAYERS’ INTERACTION IN INTERNATIONAL ARBITRATION, *supra* note 553. And for the empirical survey, refer Constantine Partasides, Niuscha Bassiri, et al., ‘Arbitral Secretaries’, in Berg, *supra* note 529.

<sup>608</sup> The then Deputy Counsel at the Secretariat of the International Court of Arbitration of the International Chamber of Commerce at the time of publication of his article and presently, Counsel at the Secretariat of the International Court of Arbitration of the International Chamber of Commerce. <https://iccwbo.org/contact-us/contact-sicana/>

<sup>609</sup> Paul Di Pietro, ‘The ICC’s Perspective on the Practice of Administrative Secretaries’ at pg. 103, in ARBITRAL SECRETARIES, *supra* note 475.

<sup>610</sup> Paul Di Pietro, ‘The ICC’s Perspective on the Practice of Administrative Secretaries’ at pg. 105 in *Id.*

<sup>611</sup> Constantine Partasides, ‘Transparency and the role of Arbitral Secretaries’, pages 1-8 and Jean Pierre-Fierens, ‘An Arbitrator’s View on the Expected Assistance from the Arbitral Tribunal’s Secretary’, pgs. 111-118 in *Id.*

To round this debate, Dasser and Igbokwe argued that the ICC approach towards Tribunal Secretary hadn't changed much even by 2017 in as much it failed to recognize that arbitral practice had embraced role of drafting for Tribunal Secretaries, albeit under supervision and limited to procedural and non-substantive part and yet, the approach globally indicated that there has been an acknowledgement of their role within ICA if not a uniformity of the rules around their duties.<sup>612</sup>

### 5.3.5. SUMMING UP PRACTICAL NEED OF TRIBUNAL SECRETARY

To sum up, judicialization of ICA has been powerful driver for employing Tribunal Secretaries and this is reflected in their value being expressed constantly in terms of efficiency advantages for the ICA practice as a whole. This is borne out both empirically as well as affirmation within the ICA community. This affirmative disposition of their usage therefore, reflects the shared value within the ICA community which also in turn is reflected in how the practice of ICA has developed over the last three decades.<sup>613</sup>

Put together, empirical surveys, understandings of those within the ICA community also reflect the practices adopted by the ICA community that reveals both a widespread usage as well as familiarity with the post of Tribunal Secretary.<sup>614</sup> That is, even if they are not appointed in every single proceedings, ICA community today is aware of this practice, has acknowledged its place within the reality of ICA, as Pierre Lalive<sup>615</sup> would have put or, is willing to be open about their regularity as Constantine Partasides<sup>616</sup> has argued for.

All this has resultingly led to Tribunal Secretaries to become part of the practice as a legitimate actor within the ICA practice<sup>617</sup> and more so, because the ICA community was already predisposed in employing Tribunal Secretaries as evidenced by number of practitioners who had acted as Tribunal Secretary or as the results of empirical surveys show the familiarity within

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<sup>612</sup> Felix Dasser and Emmanuel O. Igbokwe, 'The Award and the Courts, Efficient Drafting of the Arbitral Award: Traditional Ways Revisited – Lesson Learned from the Past?' pgs 279-315 in KLAUSEGGER ET AL., *supra* note 553.

<sup>613</sup> More specifically, Kaczmarczyk and Lam, *supra* note 81; Haas, *supra* note 81; Bianchi, *supra* note 148; TWINING, *supra* note 381.

<sup>614</sup> Refer Section 3.2. of Chapter 3 for detailed discussion.

<sup>615</sup> Lalive, *supra* note 550; Lalive, *supra* note 560.

<sup>616</sup> Constantine Partasides, 'Transparency and the role of Arbitral Secretaries', in ARBITRAL SECRETARIES, *supra* note 475.; Constantine Partasides, 'Secretaries to Arbitral Tribunals', in PLAYERS' INTERACTION IN INTERNATIONAL ARBITRATION, *supra* note 553.

<sup>617</sup> JENSEN, *supra* note 149. Concludes his work with the line, "There is every reason to acknowledge them as legitimate actors in the arbitral process" at para 10.28.

the ICA community as a whole. This predisposition, reflected in values and practices<sup>618</sup>, was but one of the paths that the ICA community took when confronted with the challenge of judicialization. The familiarity with appointment of Tribunal Secretary therefore as a practice was strengthened with the values of advantage and benefit in terms of efficiency that such appointments brought, especially, in larger and more complex cases.<sup>619</sup> The larger point here being that, beyond its learning role<sup>620</sup> as well as providing assistance to the problem of judicialization, the ICA community sees this role as an integral part of practice of ICA.

#### **5.4. CONCLUSION**

The study of mastering the file, that is, the tasks associated where the tribunal secretary gains command over the file assists in better stocktaking for the next chapter. The next chapter discusses the role in drafting and deliberations of the tribunal. Both these tasks posit a certain command over the record by the tribunal secretary.

This chapter presents two key conclusions: first that the engagement with the record by a tribunal secretary is not trivial but substantial. The mastering of the file requires that the tribunal secretary engages in two tasks: first, of maintaining the record. This is the clerical component of the task but in order to engage with effectiveness requires that the tribunal secretary understands the case to a certain minimum degree. The second task is that of actually understanding the case in order to be able to effectively provide the support of summarization, preparation of internal notes and research to the tribunal. This perfection of knowledge is expected of the tribunal secretary by the arbitrators who rely upon them in order to ensure that certain details are not missed.

In turn this leads to the tension of supervision where an effective supervision requires that the arbitrator too is conversant with the arbitral record. This is necessary in order to both benefit through effective use of the secretary as well as to be able to appreciate the work that he produces.

At core of this lies the pressures of complexity of cases, judicialization and historical usage of tribunal secretaries by the arbitrators. It thereafter proceeds to highlight the established presence of this appointment within the ICA community and thus, reflecting a positive

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<sup>618</sup> Kaczmarczyk and Lam, *supra* note 81.

<sup>619</sup> *Id.*; Cox and Béland, *supra* note 559.

<sup>620</sup> Refer Chapter 6 for detailed discussion on learning opportunities.

disposition within the ICA community as a whole to continue its reliance and usage with judicialization reflecting one of the key challenges where they have been found beneficial. This aspect also has a direct bearing on the larger question of whether to allow such appointments and if so, to what extent.

The affirmative answer to the first enabled a more granular discussion to delve into the latter where multiple sources, including those of IAC rules, court decisions as well as findings from empirical survey were put together to explore the tensions or the grey area within the practice. Here, the purpose was to present how Tribunal Secretaries actually work. These inferences are directly relevant in as much that both the value in terms of being advantageous to the ICA practice as a whole alongside the well-established practice of their use reflects a positive disposition within the ICA community to continue their use. This therefore directly contributes towards understanding the necessity of the IAC rules both in terms of minimizing the decalage with practice while enabling sufficient room for flexibility for the arbitral tribunals to tailor these appointments to their needs.

As a result, the key argument that emerges here is that the promotion of the gap between reality and rules or attempts for further deeper regulations are both likely to contribute towards the problem of undisclosed secretary because, their acceptance as a value and their usage as a practice enjoys a strong disposition within the ICA community already. Therefore, rules that are prohibitive or diverge from reality of practice are likely to only further pushing this practice into secrecy rather than actually achieving the goal of restricting their duties.

Therefore, from a policy perspective the outcome of this chapter strongly favours the realistic argument put forward most notably by Lalive<sup>621</sup> and Partasides<sup>622</sup> towards the a realistic acknowledgment of their presence within ICA and to proceed to engage with the regulating their activities by building on a realistic appreciation of their tasks. This is so because it is only then a more aligned outcome of understanding of delegation and contractual obligations can be developed by IACs as well as by the ICA community itself. Conversely, a bookish<sup>623</sup> or

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<sup>621</sup> Lalive, *supra* note 550; Lalive, *supra* note 560.

<sup>622</sup> For instance, Partasides, *supra* note 425. And Constantine Partasides, ‘Secretaries to Arbitral Tribunals’ pgs. 84-88 in PLAYERS’ INTERACTION IN INTERNATIONAL ARBITRATION, *supra* note 553.

<sup>623</sup> Lalive, *supra* note 550.

hypocritical<sup>624</sup> view or that of decalage<sup>625</sup> is only going to put this practice behind the curtains but alive and working. This only enhances the risk for the legitimacy of ICA because such attempts would lead to the divergence in regulation and reality, as seen in prohibition of alcohol where, they diverged to such an extent that not just that the policy failed but it has since, placed all such initiatives as wishful in public perception.<sup>626</sup>

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<sup>624</sup> Constantine Partasides, Niuscha Bassiri, et al., 'Arbitral Secretaries', in Berg, *supra* note 529.

<sup>625</sup> Constantine Partasides, 'Secretaries to Arbitral Tribunals', in PLAYERS' INTERACTION IN INTERNATIONAL ARBITRATION, *supra* note 553.

<sup>626</sup> Constantine Partasides, 'Transparency and the role of Arbitral Secretaries' at pgs 1-8 in ARBITRAL SECRETARIES, *supra* note 475. Also, refer Cox and Béland, *supra* note 559. For the failure of policy of alcohol prohibition refer, B. GUY PETERS & MAXIMILIAN LENNART NAGEL, ZOMBIE IDEAS: WHY FAILED POLICY IDEAS PERSIST (2020). Pgs 15-16; MARK THORNTON, THE ECONOMICS OF PROHIBITION (1991). Pgs 142-149.

## CHAPTER SIX

### BETWEEN AMBITION AND DILIGENCE: PRINCIPLE OF *INTUITU PERSONAE* AND BEING A TRIBUNAL SECRETARY

“Just over a year ago after I moved to Geneva I received a CV applying for the job of assistant to me. ... I opened the attachment out of curiosity and one thing caught my eye immediately. There was a heading with the formulation “Awards that I have drafted”. I had never heard of this person before but I looked down the list of awards that he had drafted and, surprise surprise, one of the awards was in a case in which I appeared as counsel.”<sup>627</sup>

“My first case was before a man by the name of Lalive, not Pierre. Pierre has an older brother named Jean Flavian who was my first arbitrator, and of course he had a secretary. One always wondered if Jean Flavian decided the dispute or his secretary. But that's what happened in those days.”<sup>628</sup>

#### 6.1. INTRODUCTION

The empirical component of this thesis focused on the three tensions associated with the duties of tribunal secretaries, namely, *first*, their engagement with the record of the arbitration proceedings; *second*, their role in preparation of drafts of orders and awards and; *third*, their presence during deliberations of the tribunal.<sup>629</sup>

The fifth chapter focused on their role as keepers of record that studied their engagement with the records. This chapter focuses on the latter two components, namely, their role in drafting and deliberations. Thus, it is about what does being a tribunal secretary mean in practice of delegated tasks. While the preceding chapter considered the impact of judicialization and historical dispositions towards having a tribunal secretary, this chapter builds on their utility as

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<sup>627</sup> INSIDE THE BLACK BOX, *supra* note 124. Pg 87

<sup>628</sup> Gerald Aksen, *Reflections of an International Arbitrator*, 23 ARBITRATION INTERNATIONAL 255 (2007). At pg. 256.

<sup>629</sup> Refer Chapter 1 for detailed discussion.

keepers and knowers of the record towards their duties of drafting and attendance at deliberations. These two duties also have a direct bearing on the *intuitu personae* or the eminently personal mandate of the tribunal. Therefore, this chapter opens with the discussion on the eminently personal mandate of the tribunal to present the literature along with the reasoning around how this personal mandate interacts with the duties of drafting and deliberations. This idea is central to this chapter because the spectrum of tasks that are delegable (or non-delegable) are closely associated with identifying what is *intuitu personae* to the arbitrator and thus, non-delegable.

Thereafter, the practice of this principle through effective supervision is discussed, including, the *tronc commun* of the case laws and institutional guidelines.<sup>630</sup> It introduces three-step conceptualization of effective supervision as direction, supervision and revision so to examine the relationship between the arbitrators and the tribunal secretaries and answer how the principle of *intuitu personae* is put to practice. In other words, these steps are inter-related and assist in grounding the praxis of this relationship.

The next sections zoom-in the role of the tribunal secretaries with respect to drafting responsibilities and deliberations in order to present the empirical findings of this research. The sections present both the extant literature as well as findings of the empirical study of these two core tasks. These sections reveal the practices that are patterned and done competently by the members of ICA community.

Thereafter, the empirical findings on the informal and undisclosed secretarial assistance are discussed. Though, one key limitation of this empirical study is locating individuals who acted informally or in undisclosed manner because such information is not easily accessible. However, within the constraints of this limitation, the empirical study's findings are discussed.

The final section concludes the chapter by presenting the learning potential associated with this role alongside the discussion of how the tribunal secretaries navigate the role. It concludes the chapter by connecting the principle of *intuitu personae* and effective supervision with the experiences of learning and navigation of the role of tribunal secretary. Thus, rounding off of what it means to be a tribunal secretary in practice.

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<sup>630</sup> Joshua Karton, *supra* note 291. Pg. 302

## **6.2. THE PRINCIPLE OF *INTUITU PERSONAE* AND THE TRIBUNAL SECRETARY**

Almost all writings on tribunal secretaries are prefaced with the concern of delegation of tasks to tribunal secretary and its relationship with the eminently personal mandate of the arbitrator(s).<sup>631</sup> This section commences with the explanation of the principle of *intuitu personae* or eminently personal mandate of the arbitrator(s). The purpose being to show that principle of *intuitu personae* is a strongly held shared value within the ICA community. It thereafter discusses how this principle relates to tribunal secretary and more specifically, to the two core tasks of drafting and deliberations.

Thereafter, it presents the findings from the empirical study to corroborate the writings that it is a strongly held shared value acting as a causal principle for role of the tribunal secretary and a test of validation in respect of the duties delegated to the tribunal secretary.

It thereafter proceeds to discuss cases where the duties and tasks of the tribunal secretary came up before the Courts. Without exception, all of them engaged with the principle of *intuitu personae* or the eminently personal mandate of the arbitrator as part of the submissions of the parties and where the Court did pronounce on these submissions, as part of the judicial analysis. Thereafter, the idea of direction, supervision and revision as means of putting the principle of *intuitu personae* as a practice is discussed. This allows for ascertaining the practices that came up before the Courts for adjudication as well as response of the Courts towards these practices.<sup>632</sup> The facts presented before the Courts requiring presentation of evidence provide a snapshot of at least the problematic cases bringing to fore the nature of delegated tasks and the supervision of tribunal secretary.<sup>633</sup>

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<sup>631</sup> Constantine Partasides, *supra* note 172.; Pierre Tercier, *supra* note 9.; Benjamin F. Hughes, *supra* note 11.; Michael Polkinghorne and Charles B Rosenberg, *supra* note 16.; Olufunke Adekoya, *supra* note 11.; Thomas Clay, *Le Secretaire Arbitral*, 2005 REVUE DE L'ARBITRAGE 931 (2005). Pgs. 953-954; BORN, *supra* note 164. Section 13.07[B];

<sup>632</sup> Kaczmarczyk and Lam, *supra* note 243.;

<sup>633</sup> KATHARINA PISTOR, *supra* note 29. Pages 180-182 Makes a strong case in favor of review over of arbitration proceedings that national Courts provide stating, “Something is lost, however, when cases are resolved not in a courtroom where they can be seen, dissected, and critiqued by others, but in its shadows. Disputes are the oxygen that keeps law alive and ensures that it is continuously adapted to a changing world. ... As a result of these court avoidance strategies, the distance between presumed and actual recognition of the validity of the work that private attorneys perform is increasing, and the assertions lawyers make to soothe their clients that their legal opinions are grounded in law is becoming more tenuous. Rather than building their legal opinions on existing case law, they have to guess how a court might decide if a case ever came before it.”

Through, this the discussion of principle of *intuitu personae*, its relationship with tribunal secretary through practices of effective supervision over the delegated tasks as a necessary safeguard to the decision-making responsibilities is discussed. Building on this explication, the section concludes that this principle through case law and incorporation in various guidelines and rules of IACs, writings of members of ICA community and empirical findings completes the triangulation of this principle as a value, practice and institution.<sup>634</sup>

#### 6.2.1. THE PRINCIPLE OF *INTUITU PERSONAE*

The *raison d'être* of an arbitrator or a tribunal is to resolve the dispute submitted by the parties. The American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes lists making decisions in “a just, independent and deliberate manner” as a key obligation with further elucidation that “an arbitrator should not delegate the duty to decide to any other person”.<sup>635</sup> The International bar Association’s Rules of Ethics for International Arbitrators states similarly that “Arbitrators shall proceed diligently and efficiently to provide the parties with a just and effective resolution of their dispute”.<sup>636</sup> SIAC Code of Ethics for an arbitrator lists that after commencement, “the arbitrator shall acquaint himself with all the facts and arguments presented and all discussions relative to the proceedings so that he may properly understand the dispute”.<sup>637</sup> Similarly, the UNCITRAL Notes on Organizing Arbitral Proceedings, 1996 notes in relation to the tribunal secretaries that they do “not perform any decision-making function of the Arbitral Tribunal”.<sup>638</sup>

To put it simply, there is unanimity within the ICA community that the arbitrators have the personal mandate to resolve the disputes submitted to them in an adjudicatory manner.<sup>639</sup> This

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<sup>634</sup> Kaczmarczyk and Lam, *supra* note 243. Pg. 716 argues that all three - values, practices and institutions - require study in order to be able to paint whole picture because all three elements are connected to each other.; TWINING, *supra* note 314. Also argues against naïve assessment of law by merely comparing the surface texts.; Jeffrey Dunoff and Mark Pollack, *supra* note 12.

<sup>635</sup> American Arbitration Association, *The Code of Ethics for Arbitrators in Commercial Disputes*, (2004), [https://www.adr.org/sites/default/files/document\\_repository/Commercial\\_Code\\_of\\_Ethics\\_for\\_Arbitrators\\_201\\_0\\_10\\_14.pdf](https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_201_0_10_14.pdf). Canon V(C); JEFFREY WAINCYMER, *supra* note 406. Pg. 91;

<sup>636</sup> International Bar Association, *Rules of Ethics for International Arbitrators*, <https://www.ibanet.org/document?id=Rules-of-ethics-for-international-arbitrators>. Article 1

<sup>637</sup> Singapore International Arbitration Centre, *SIAC Code of Ethics for an Arbitrator*, <https://siac.org.sg/code-of-ethics-for-an-arbitrator>. Rule 6

<sup>638</sup> UNCITRAL Notes on Organizing Arbitral Proceedings, 1996, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-e.pdf>. Article 27

<sup>639</sup> BORN, *supra* note 164. Section 13.04[A]; Martin Hunter and Allan Philip, *supra* note 151.; JEFFREY WAINCYMER, *supra* note 406. Pgs. 91-93; JAN PAULSSON, *supra* note 150. Pgs 170-171; Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575 (2006). Pg. 586;

is the principle of *intuitu personae*, that is, it is the personal duty of the arbitrators to decide the dispute submitted to them. The upshot of this being that the first promise of the arbitrators to the parties is: they will consider all facts and reasons personally and thereafter, deliver a credible and enforceable award.<sup>640</sup>

In other words, the arbitrators voluntarily place themselves at the service of the parties to give them a serious hearing and making decisions on consideration of all the materials that the parties put to them.<sup>641</sup> Thus, they take upon themselves a set of duties of which the core duty is to resolve the matter in an adjudicatory fashion.<sup>642</sup> Therefore, this decision-making responsibility is central to their mandate as arbitrators. That is, they accept to complete this mandate of dispute resolution solely by themselves.<sup>643</sup> To put it conversely, this responsibility to decide the dispute cannot be sub-contracted or delegated.

Therefore, the arbitrators are required to study the submissions, evidence and other documents submitted by the parties, to conduct the hearings, to issue necessary procedural orders and eventually, render an award in view of the applicable law deciding all the issues raised by the parties.<sup>644</sup> This includes hearing the parties on equal footing so as to enable them full opportunity to present their case.<sup>645</sup> The issuance of the award requires resolution of all the issues presented by the parties, including their analysis that explains the reasons for rejection of claims or defenses of the losing party demonstrating that its arguments were considered seriously and that the decision was based on reasoning rather than prejudice or fancy.<sup>646</sup>

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Constantine Partasides, *supra* note 172.; Bernardo M. Cremades, *The Arbitral Award*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 813 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014).; Maarten Draye and Emily Hay, *supra* note 174. Pg. 81; Paul Di Pietro, *supra* note 349. Pg. 101; Michael E. Schneider, *supra* note 186.; Felix Dasser and Emmanuel O. Igbokwe, *supra* note 175. Pg. 296; Eric Schwartz, *supra* note 322.; A.\_\_\_\_\_ SA v. B.\_\_\_\_\_ Sàrl, 4A\_709/2014 (2015).; Pierre Tercier, *supra* note 9. Pg. 538;

<sup>640</sup> JAN PAULSSON, *supra* note 150. Pg. 8

<sup>641</sup> *Id.* Pg. 170; Paul Di Pietro, *supra* note 349.

<sup>642</sup> BORN, *supra* note 164. Sections 13.04[A][1], 13.04[A][4], 13.04[A][5] and 13.04[A][8]

<sup>643</sup> JEFFREY WAINCYMER, *supra* note 406. Pg. 91

<sup>644</sup> Martin Hunter and Allan Philip, *supra* note 151.; Michael E. Schneider, *supra* note 186.

<sup>645</sup> Albert Jan van den Berg, *Organizing an International Arbitration: Practice Pointers*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 415 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014).; JAN PAULSSON, *supra* note 150. Pg. 170;

<sup>646</sup> JAN PAULSSON, *supra* note 150. Pg. 170; Bernardo M. Cremades, *supra* note 639. Pgs. 817-818; Felix Dasser and Emmanuel O. Igbokwe, *supra* note 175.

This mandate of arbitrator is unique and *sui generis* arising from the contract of the parties to arbitrate and on account of the adjudicatory nature of their and thus, at the same time being independent and autonomous from parties' control and directions.<sup>647</sup> The principle of party autonomy is the core of ICA being a foundational principle and therefore, the appointment of arbitrator to decide the dispute arises from this consent given by the parties.<sup>648</sup> The other dimension is the adjudicative dimension whereby the arbitrator acts free of the partisan interests acting in effect as a "quasi-judicial adjudicator".<sup>649</sup> This is reflected in the duty to be independent and impartial and thereby, act as a neutral third-party decision-maker.<sup>650</sup>

Though, institutional guidelines do not create normativity on their own but, as discussed in the next sub-sections, in view of the values expressed by the practitioners and institutionalized through Court decisions from different countries, the principle of *intuitu personae* enjoys a normative force that can be invoked to both set-aside awards as well as seek removal of the arbitrator(s).<sup>651</sup> In this manner, the guidelines invoking this principle enjoy normative force and if substantiated with evidence before the competent Courts would lead to sanction.

As a leading arbitrator and academic Jan Paulsson termed this principle as the first arbitral virtue of *commitment*, that is, the arbitrators promise to the arbitrants that they will consider all facts and reasons that would lead to a credible and enforceable award.<sup>652</sup> In that, the arbitrator or the tribunal would carry out their obligation to resolve the dispute submitted to them personally and thus, would not delegate this function.

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<sup>647</sup> BORN, *supra* note 164. Section 13.03[A]

<sup>648</sup> JOSHUA KARTON, *supra* note 27. Pgs. 79-80 on the centrality of party's autonomy to the conduct of international arbitration; Popplewell J., P v. Q and Ors. 2017 EWHC 194 (Comm) (2017).; A.\_\_\_\_\_ SA v. B.\_\_\_\_ Sarl, *supra* note 639.; Emek Insaat Sti Ltd against European Union, <https://juportal.be/content/ECLI:BE:CASS:2023:ARR.20230424.3F.1/FR>.

<sup>649</sup> Jivraj v. Hashwani, [2011] UKSC 40. Para 41, UK Supreme Court put it as, "The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party. As the International Chamber of Commerce ("the ICC") puts it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a "quasi-judicial adjudicator""

<sup>650</sup> Catherine A. Rogers and Jeffrey C. Jeng, *supra* note 157.

<sup>651</sup> FELIX DASSER, *supra* note 279. Paras 495-498

<sup>652</sup> JAN PAULSSON, *supra* note 150. Pg. 8

### 6.2.2. THE PRINCIPLE OF *INTUITU PERSONAE* AND IT'S RELATION TO THE DUTIES OF THE TRIBUNAL SECRETARY

One of the earliest debates on the role of tribunal secretary took place between Pierre Lalive and Eric Schwartz in the early 1990s focused on the tension - of limits of delegability - and the answer to this tension being centered on the concept of *intuitu personae* or the eminently personal mandate of the arbitrator.<sup>653</sup> Eric Schwartz, the then Secretary-General, discussed the role of tribunal secretaries under the heading “Non-delegation of duties” arguing that the arbitrator’s mandate is a personal and cannot be delegated to another person.<sup>654</sup> In this respect he argued that the presence of tribunal secretaries required regulation so as to “not influence in any manner whatsoever the decisions of the arbitral tribunal”.<sup>655</sup> He cited one instance where an arbitrator, a partner in a law firm, who could not attend one of the procedural hearing requested one of his partners to attend in his place.<sup>656</sup> In a nutshell, Schwartz stated that arbitrators are personally appointed by the parties under the arbitration agreement so as to carry out their tasks and thus, they cannot delegate their decision-making mandate to any third party, including a tribunal secretary.

Pierre Lalive wrote against such preconception, of linking tribunal secretary as in itself being a derogation of decision-making responsibilities by the arbitrator, in series of articles directly attacking the “ICC Note concerning the appointment of Administrative Secretaries by Arbitral Tribunals” [hereinafter, ICC Note, 1995] as bureaucratic and lacking in grounding of practice of international arbitration.<sup>657</sup> He specifically argued that such measures as regulation of the duties and tasks of tribunal secretary are bookish because in vast majority of cases appointments of tribunal secretary is with full consent of parties and provides for training of

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<sup>653</sup> Refer Chapter 5, Section 5.3.2.3.; Pierre Lalive, *supra* note 9.; Pierre Lalive, *supra* note 9.; Eric Schwartz, *supra* note 322.; Eric Schwartz, *supra* note 322.

<sup>654</sup> Eric Schwartz, *supra* note 322. Pg. 86

<sup>655</sup> *Id.* Pg. 86

<sup>656</sup> *Id.* Pg. 86

<sup>657</sup> YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION (2nd ed ed. 2005). Appendix 4d pgs. 421-422.

future arbitrators alongside saving of time and costs associated with arbitration.<sup>658</sup> The result of this debate was that the ICC Note 1995 was rendered obsolete.<sup>659</sup>

This tension of *intuitu personae* and supervision was later reflected in the article famous for the moniker of ‘The Fourth Arbitrator’, where Constantine Partasides noted that the duty to delegate decision-making was uncontroversial while discussing the assistance received by the arbitrator.<sup>660</sup> As an analogy, he discussed various fora, including the practices at US Supreme Court and référendaires at the European Court of Justice, to highlight the role of assistance as integral part of the judicial functioning.<sup>661</sup> He also argued that there is a specific obligation of *intuitu personae* for the arbitrators in international arbitration and therefore, non-delegation of decision-making by the arbitrators is core to their appointment.<sup>662</sup> In essence, he argued that no decision-making responsibility was lost as long as arbitrators retained control over the process through supervising the secretary in form of highly-structured tasks and subsequent reviews.<sup>663</sup>

The principle of *intuitu personae* was highlighted as core to the arbitral function and therefore, having a direct bearing on the proper role of tribunal secretaries in an empirical survey conducted jointly by International Disputes Committee and Committee on Arbitration of the New York City Bar Association.<sup>664</sup> Citing Eric Schwartz’s *The Rights and Duties of ICC Arbitrator*, that had originally triggered the debate with Pierre Lalive in 1995, their report noted possibility of derogation from this *intuitu personae* nature of the arbitrator’s role.<sup>665</sup> As a way ahead, the report stated that close supervision and exercising of ultimate decision-making

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<sup>658</sup> Pierre Lalive, *supra* note 9.

<sup>659</sup> Constantine Partasides, *supra* note 172. Argues as such.; Paul Di Pietro, *supra* note 349. Conceded as much that the 1995 Note quickly faced obsolescence.; Thomas Clay, *supra* note 631. Pg. 950 Comments that rarely has the debate been so vigorous;

<sup>660</sup> Constantine Partasides, *supra* note 172.

<sup>661</sup> *Id.*

<sup>662</sup> *Id.* Pg. 156, “Secondly, unlike one's arbitrator, one does not choose one's judge. Returning to a theme addressed at the outset of this article, the relationship between judge and party is not one of *intuitu personae*.”

<sup>663</sup> *Id.* Pg. 156

<sup>664</sup> Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 639.

<sup>665</sup> *Id.* Pgs 586-587

authority by the arbitrators would reconcile this fundamental principle of *intuitu personae* and the tribunal's need for secretarial assistance.<sup>666</sup>

In his three-volume magnus opus 'International Commercial Arbitration', Gary Born lists the obligation to not delegate his duties as one of the key obligations of an arbitrator and stating the duty to decide a case as fundamental to arbitrator's mandate.<sup>667</sup> This includes attendance at hearings, deliberations and evaluation of parties submissions and evidence and together they make up the essence of the adjudicative function of the arbitrator. This alongside with the duties of diligence and carrying out the adjudicative function means that the arbitrator must resolve the dispute and resolve it through demonstration of skill and effort as efficiently as possible.<sup>668</sup> He notes that among this is the fundamental duty to not delegate the duty of deciding the case.<sup>669</sup> This means that the decision-making cannot be subcontracted or delegated to any third party. Therefore, the tribunal secretary can be delegated tasks at tribunal's discretion except that involves delegation of its own essential adjudicative functions.<sup>670</sup> In other words, the role of the tribunal secretaries is circumscribed to the extent that it may assumes tribunal's functions, especially, its decision-making.<sup>671</sup>

Michael Hwang, a senior arbitrator from Singapore, in his discussion of having a legal assistant assist him in ad-hoc proceedings justified it on the grounds of efficiency of the proceedings.<sup>672</sup> He too linked with the decision-making function by stating that his practice did not compromise the arbitral mandate because decision-making was not part of such delegation.<sup>673</sup> To this end, he suggested restricting the assistance to highly structured and closely supervised tasks as well as subjecting the assistance to critical review.<sup>674</sup>

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<sup>666</sup> *Id.* Pg. 586, "The role of the arbitrator is characterized by its *intuitu personae* nature. The appointment of a secretary may be reconciled with this fundamental principle as long as the arbitral tribunal exercises both close supervision of and has ultimate authority over the decision-making process."

<sup>667</sup> BORN, *supra* note 164. Section 13.04[A][8]

<sup>668</sup> *Id.* Sections 13.04[A][1], 13.04[A][4] and 13.04[A][5]

<sup>669</sup> *Id.* Section 13.04[A][8]

<sup>670</sup> *Id.* Section 13.07[B]

<sup>671</sup> *Id.* Section 13.07[B]

<sup>672</sup> MICHAEL HWANG S. C., SELECTED ESSAYS ON INTERNATIONAL ARBITRATION (2013). Pg. 16

<sup>673</sup> *Id.* Pgs. 15-17

<sup>674</sup> *Id.* Pg. 17

Pierre Tercier, a senior arbitrator, too acknowledged that the personal mandate of the arbitrators was foundational to discussion of understanding the role of the tribunal secretaries.<sup>675</sup> More specifically, this meant that they cannot delegate decision-making to the secretaries, whether by subcontract or substitution.<sup>676</sup> This in turn meant that the arbitrators personally acquaint themselves with the record of the proceedings and keep control over the secretary's work through supervision.<sup>677</sup>

More recently, Alexis Mourre in his reflective essay, *The Virtuous Arbitrator*, placed the inquiry of fulfilling the decision-making duties alongside the question of regulation of the tasks of tribunal secretaries.<sup>678</sup>

The foregoing is the snapshot, covering writings of practitioners from the last three decades and different geographical locations that frame the role of tribunal secretary by linking it with the eminently personal mandate of decision-making of the arbitrator. This particular framing reveals that the principle of *intuitu personae* or the personal mandate of the arbitrators is the key value that the ICA community espouses and wants to adhere to.<sup>679</sup> This value also lays emphasis on control over the tribunal secretary's tasks and critical review of their output. Thus, the supervision of tribunal secretary and the principle of *intuitu personae* are joined at the hip. This dynamic has remained constant for over three decades having been reiterated as central to the legitimacy of international arbitration.<sup>680</sup>

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<sup>675</sup> Pierre Tercier, *supra* note 9.

<sup>676</sup> *Id.* Pg 537

<sup>677</sup> *Id.* Pgs. 541, 546

<sup>678</sup> Alexis Mourre, *Epilogue: The Virtuous Arbitrator*, in THE MENA LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 717 (Gordon Blanke, Soraya Corm-Bakhos, & Nayla Comair-Obeid eds., 2023).

<sup>679</sup> Refer Kaczmarczyk and Lam, *supra* note 243. Pg. 717, "Values define what people respect and what legitimizes the existence of practices and institutions."; For the role of agents in diffusion of legal ideas, TWINING, *supra* note 307. Pgs. 282-283; Also refer, JOSHUA KARTON, *supra* note 27. Pgs. 99-101 and 140 In context of the norm of party autonomy states that "some of these norms can be expressed in terms of values, ie, normative priorities shared by arbitrators" and it includes providing service of resolution of disputes and being compensated for it.; JAN PAULSSON, *supra* note 150. Pg. 8; BORN, *supra* note 164. Section 13.04[A]8;

<sup>680</sup> For instance, refer Pierre Tercier, *supra* note 9. Pgs 534-537; Constantine Partasides, *supra* note 172. Pg. 148; Martin Hunter and Allan Philip, *supra* note 151. Succinctly summarize the duty of arbitrator as "to be independent of the parties and in an unbiased way and in accordance with due process and the applicable *lex arbitri* and arbitration rules to make themselves acquainted with the facts of the case and the claims, allegations and defences of the parties and, within a reasonably short period of time, to make a reasoned award, based upon the applicable law, which fulfills the requirements for the award to be enforceable."; Also refer Article 1 of IBA Rules of Ethics for International Arbitrators; Jan Paulsson lists the commitment to personally and deeply engage in the arbitration proceedings as a the first arbitral virtue in JAN PAULSSON, *supra* note 150. Pg 8; MICHAEL HWANG S. C., *supra* note 672. Pgs 15-17; Jean Pierre-Fierens, *supra* note 17.

In simple words, the principle of *intuitu personae* is a value shared within the ICA community as a foundational principle upon which ICA is predicated.<sup>681</sup> It acts as a guiding principle in determining the scope of duties delegated to the tribunal secretary and the manner of such delegation through effective supervision.

#### 6.2.2.1. Drafting and Deliberations as two core tasks

Chapter 5 discussed the role of the tribunal secretary in engagement with the arbitral record the file where he carried out organizational tasks related to the conduct of the arbitration as well as acting as keeper of record in maintaining the file.<sup>682</sup> Alongside with these duties he carried out the tasks of preparation of notes of summarization, lists and chronologies. None of these duties are considered exceptional or potentially in violation of the principle of *intuitu personae*.<sup>683</sup> Though, in the case of Sonatrach, the claimant had argued that a potential breach on account of tribunal secretary preparing three internal notes but it was dismissed by the English High Court with the pithy statement that such notes are part of standard practice in ICC arbitrations.<sup>684</sup>

The concerns around the role of the tribunal secretary can be grouped under two broad set of tasks: drafting and deliberations.<sup>685</sup> The obvious reason is the closeness of each of these tasks to the decision-making responsibilities of the arbitral tribunal.<sup>686</sup> However, both these tasks

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<sup>681</sup> Kaczmarczyk and Lam, *supra* note 243.

<sup>682</sup> Refer Chapter 5 for detailed discussion.

<sup>683</sup> For instance, Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 639.; YOUNG ICCA GUIDE, *supra* note 388. Pgs. 23-25

<sup>684</sup> Refer 6.2.4. for detailed discussion on the case; Flaux J, La Société Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation Des Hydrocarbures SpA ('Sonatrach') v Statoil Natural Gas LLC 2014 EWHC 875 (Comm) (2014). Para 48

<sup>685</sup> For instance, refer Constantine Partasides, *supra* note 172. Noting the concern with regard to drafting responsibilities of the tribunal secretary; Also, Zachary Douglas, *supra* note 14. Narrating a personal anecdote where he received an application by former tribunal secretary listing the awards he had drafted; Paulo Michele Patocchi & Robert Briner, *The Role of the President of the Arbitral Tribunal*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 281 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014). Noting that "involvement of junior assistants and administrative secretaries, whether disclosed or undisclosed (in fact more often than not, undisclosed to the parties), tends to produce awards, the most striking feature of which is the conspicuous absence of synthesis in the presentation of the parties' position, and a corresponding massive resort to cut and past;" J. OLE JENSEN, *supra* note 18. Para 9.42 "Second, in less scientific terms, some awards 'scream out loud' that they do not stem from the arbitral tribunal. At the scrutiny stage of the proceedings, the ICC sometimes encounters problems when it realizes that the quality of certain parts of the draft award do not live up to the required standard. This is in line with observations by parties that some awards are 'a cut and paste between Sesame Street and Shakespeare', '[p]art Enid Blyton, part Tolstoy', or 'clearly drafted "by someone who was never in the room"'";

<sup>686</sup> For instance, Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 639. Pg 576, "Not surprisingly, it is these latter

encompass a diversity of activities and therefore, do not admit of simple acceptable or unacceptable as answer when discussing permissibility of delegation.<sup>687</sup>

This in turn has led to difficulty in framing uniform standards even among the institutions.<sup>688</sup> One of the earliest attempts to regulate the conduct of tribunal secretaries was made by ICC in 1995 through issuance of Note but was rendered quickly obsolete.<sup>689</sup>

Though, the call for uniform standards across institutions is not a recent one with Constantine Partasides, writing as far back as 2002, who noted the difficulty of achieving consensus as to a code for secretaries that risked aggrandizing this role independent to the tribunal.<sup>690</sup> The Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York Bar Association in turn advocated a checklist approach for the parties and the arbitrators when appointing a tribunal secretary in view of difficulty of creating a single unified standard.<sup>691</sup>

Almost a decade later, Polkinghorne and Rosenberg argued for uniform code for tribunal secretary emphasizing that such a codification is both possible and necessary in order to strengthen the perceived legitimacy of arbitration because such a code would minimize the likelihood of secretaries acting impermissibly with regard to decision-making responsibilities of the tribunal.<sup>692</sup> Polkinghorne and Rosenberg built their argument for need of uniform standards in view of the Young ICCA Surveys of 2012 and 2013 that eventually led to a full report on best practices for tribunal secretaries.<sup>693</sup>

The Young ICCA Guide on Tribunal Secretaries grounded in two large quantitative surveys argued for best practices approach and proposed a set of guidelines that could be adopted for

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instances – where arbitral secretaries are involved, or are perceived to be involved, in the deliberations of the tribunal and/or the drafting of awards – that give rise to some controversy.”;

<sup>687</sup> *Id.* Realizing the difficulty of diversity of tasks that maybe performed the proposed a checklist approach where parties can go through a list at the stage of appointment to decide on delegable tasks alongside questions of remuneration.

<sup>688</sup> For instance, Michael Polkinghorne and Charles B Rosenberg, *supra* note 16.; Constantine Partasides, *supra* note 172.; Felix Dasser and Emmanuel O. Igobokwe, *supra* note 175.

<sup>689</sup> Refer Chapter 5, Section 5.3.2.3 and Section 6.2.1. for details on the debates around the 1995 Note.; Refer Constantine Partasides, *supra* note 172. And Paul Di Pietro, *supra* note 349. On its obsolescence.

<sup>690</sup> Constantine Partasides, *supra* note 172. Pg. 159

<sup>691</sup> Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 639.

<sup>692</sup> Michael Polkinghorne and Charles B Rosenberg, *supra* note 16. Pg. 128

<sup>693</sup> *Id.*; YOUNG ICCA GUIDE, *supra* note 388.

regulating tribunal secretaries.<sup>694</sup> The proposed guidelines were subsequently referred by the English High Court in the case *P v. Q* when discussing the role of the tribunal secretaries.<sup>695</sup> The Guidelines proposed a list of ten tasks<sup>696</sup> that tribunal secretaries carried out of which the tasks can be clubbed under three broad categories:-

First, mastering the file that would include organizational and administrative tasks associated with the conduct of the hearing, handling and maintenance of the record and preparation of notes on discrete questions of facts or law;

Second, drafting responsibilities that would include analyzing the parties' submissions, drafting procedural orders and drafting parts of the award and;

Third, attending deliberations.

While SIAC and SCC have not provided a list of tasks that maybe delegated to the tribunal secretary, other institutions have taken a more proactive approach. ICC in its latest Note to Parties and Arbitral Tribunals on the Conduct of Arbitration recognizes that the tribunal secretary may prepare drafts of procedural orders as well as factual portions of an award for review of the tribunal as well may attend deliberations.<sup>697</sup> HKIAC Guidelines on Use of Secretary to Arbitral Tribunal also provides that the secretary may attend deliberations and take notes as well as prepare drafts of non-substantive letters and non-substantive parts of the tribunal's orders, decisions and awards.<sup>698</sup>

Therefore, once the tasks associated with the administrative and record-keeping of the files are removed, the two sets of tasks that are left are drafting and attendance in deliberations. As the guidelines quoted above reveal that there is still no unanimity as to what constitutes each of these categories and where the red line, so to say, is to be drawn. However, for the purpose of this chapter, this demarcation serves the purpose of appreciating the outcomes of the empirical

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<sup>694</sup> YOUNG ICCA GUIDE, *supra* note 388.

<sup>695</sup> Refer 6.2.4. for detailed discussion on the case; Popplewell J., *supra* note 648. Paras 56-60

<sup>696</sup> YOUNG ICCA GUIDE, *supra* note 388. Pg. 2, 11, "(2) On this basis, the arbitral secretary's tasks may involve all or some of the following: (a) Undertaking administrative matters as necessary in the absence of an institution; (b) Communicating with the arbitral institution and parties; (c) Organizing meetings and hearings with the parties; (d) Handling and organizing correspondence, submissions and evidence on behalf of the arbitral tribunal; (e) Researching questions of law; (f) Researching discrete questions relating to factual evidence and witness testimony; (g) Drafting procedural orders and similar documents; (h) Reviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence; (i) Attending the arbitral tribunal's deliberations; and (j) Drafting appropriate parts of the award."

<sup>697</sup> International Chamber of Commerce, *supra* note 434. Para 224

<sup>698</sup> Hong Kong International Arbitration Centre, *supra* note 447. Para 3.4

study. That is, this chapter presents the empirical findings for the two tensions, namely, the role of tribunal secretary in preparation of drafts of orders and awards and, their presence during deliberations of the tribunal.

### 6.2.3. DISCUSSION FROM THE EMPIRICAL STUDY

The interviewees regularly brought up the principle of *intuitu personae* and its relationship to the role of the tribunal secretary and the method of supervision. Total of twenty five interviewees discussed this principle in terms of decision-making responsibilities of the arbitrator and twenty-four interviewees discussed how the supervision of tasks was carried out.<sup>699</sup>

The interviewees, both who acted as arbitrators or were working as or had experience as tribunal secretaries, responded overwhelmingly that the decision-making solely rested with the arbitrator or the tribunal.<sup>700</sup> The interviewees were clear that analysis, that is, the reasoning behind the decision, alongside the decision rested solely with the arbitrators.<sup>701</sup> As a senior arbitrator put it that the role of the tribunal is both decision-making and communication of that decision to the parties.<sup>702</sup> With regard to commitment to this principle, there was not a single case of divergence. Those interviewees with experience as tribunal secretary consistently highlighted the importance of this principle as an adhered value in that that decision-making was not part of their responsibilities.<sup>703</sup>

As one senior arbitrator with two decades of experience put it simply that not becoming an arbitrator was central to be an effective tribunal secretary because it is likely to lead to adverse response by the arbitrators.<sup>704</sup> Another arbitrator with background as tribunal secretary noted an experience in early years of her career where she volunteered her views that was ill-received and had not done so since.<sup>705</sup> This is also true for those interviewees that had acted in an undisclosed manner.<sup>706</sup> This interviewee, who had been an undisclosed tribunal secretary,

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<sup>699</sup> Code: Intuitu Personae and Code: Direction, Supervision and Revision

<sup>700</sup> Code: Intuitu Personae

<sup>701</sup> Code: Intuitu Personae, Interviewees # 3, 5, 6, 10, 11, 12, 13, 14, 17, 18, 19, 21, 22, 25, 26, 30, 35

<sup>702</sup> Interviewee # 35

<sup>703</sup> Code: Intuitu Personae

<sup>704</sup> Interviewee # 9

<sup>705</sup> Interviewee # 21

<sup>706</sup> Interviewees # 21, 25

indicated that her role did not encompass decision-making and that the arbitrators still engaged with the record fully.<sup>707</sup> There is a clear pattern, without exception, in responses of the interviewees, that had acted as tribunal secretaries, that not overstepping the boundaries into decision-making was central to being tribunal secretary.<sup>708</sup>

A senior arbitrator, with over three decades of experience, put it bluntly that the decision-making is the responsibility of the arbitrator and that a bad arbitrator would not know how to benefit from the services of tribunal secretary.<sup>709</sup> He reasoned this to argue that anecdotes of isolated cases where such doubts exist does not mean that the entirety of role of tribunal secretary ought to be doubted. Another senior arbitrator and counsel put it pithily that cases of over-reliance on tribunal secretaries were an exception and not the norm.<sup>710</sup> This perception of derogation from decision-making has been the cause of taboo around discussion on tribunal secretaries.<sup>711</sup> An interviewee, with experience as both tribunal secretary and an arbitrator, noted that she was advised against writing on this topic because of this controversial nature.<sup>712</sup> An arbitrator explained that the taboo with having tribunal secretaries existed because of perception among some that the arbitrators were not doing the work that they were expected to.<sup>713</sup> Another senior arbitrator explained that the persistence of this taboo is the perception that there is something inherently wrong with having tribunal secretary.<sup>714</sup> He continued to add that an arbitrator can accomplish duties of decision-making with a tribunal secretary as long as it is the arbitrator that is driving and controlling the tribunal secretary's tasks. Another arbitrator, with background as tribunal secretary, stated similarly that the concern was that decision making maybe delegated to a person not appointed by the parties.<sup>715</sup> Another arbitrator, also with a background as tribunal secretary and former head of IAC, stated that the taboo originates from concern about the role of tribunal secretary, including improper delegation of decision-making tying in with concern of trust that parties may have in the tribunal.<sup>716</sup> A senior arbitrator

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<sup>707</sup> Interviewee # 25

<sup>708</sup> Code: Navigating

<sup>709</sup> Interviewee # 6

<sup>710</sup> Interviewee # 35

<sup>711</sup> For instance, Pierre Tercier, *supra* note 9.

<sup>712</sup> Interviewee # 11

<sup>713</sup> Interviewee # 15

<sup>714</sup> Interviewee # 35

<sup>715</sup> Interviewee # 28

<sup>716</sup> Interviewee # 31

quipped in response to such concerns said that a tribunal secretary could not make a bad arbitrator worse but might just make things better.<sup>717</sup> This ties in with a personal experience that a senior arbitrator Jean Pierre-Fierens who recounted an experience of a smooth arbitration involving a disorganized arbitrator presumably because of the tribunal secretary.<sup>718</sup>

The arbitrators that had experience as tribunal secretary consistently pointed out that the major difference between these two responsibilities was taking decisions.<sup>719</sup> An interviewee, with both tribunal secretary and arbitrator appointments, explained that even drafting of correspondence required adjusting the tone depending what role she played in that particular appointment.<sup>720</sup> Another arbitrator stated that difference in working was huge because now she had to take decisions, including, deciding myriad procedural issues that cropped up during the arbitration.<sup>721</sup> For instance, one interviewee explained that in an appointment as an arbitrator, she had a potential non-responding party and thus, had to take decision of using ordinary postal mail to communicate and that even such a minor issue meant thinking differently from her time as tribunal secretary.<sup>722</sup> She analogized it to witnessing a painting being made and actually painting for the role of tribunal secretary and arbitrator. Another interviewee explained the difference as that there were no safety nets that would have been in case of her appointment as tribunal secretary alongside the fact that it is now her reputation on the line when she takes decisions.<sup>723</sup>

At core of the relationship between the arbitrators and tribunal secretaries is supervision of tasks done by the tribunal secretaries. Twenty-four of the interviewees commented on the centrality of supervision and control of tasks as inherent to the relationship between tribunal secretaries and arbitrators.<sup>724</sup> The presiding arbitrator or the chair was recognized as primarily responsible for coordinating the tribunal secretary's work.<sup>725</sup>

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<sup>717</sup> Interviewee # 6

<sup>718</sup> Jean Pierre-Fierens, *supra* note 17.

<sup>719</sup> Code: Transition to Arbitrator

<sup>720</sup> Interviewee # 30

<sup>721</sup> Interviewee # 11

<sup>722</sup> Interviewee # 3

<sup>723</sup> Interviewee # 27

<sup>724</sup> Code: Direction, Supervision & Revision

<sup>725</sup> Code: Chair, Interviewees # 5, 17, 18, 28, 31

As a senior arbitrator, with experience as tribunal secretary, put it that arbitrators should be driving, directing and controlling the tasks delegated to the tribunal secretary.<sup>726</sup> A senior arbitrator with extensive experience as tribunal secretary noted that her work has always seen revision and review by the presiding arbitrator.<sup>727</sup>

Interviewees also noted that outlines of what to draft with clear skeleton was given to tribunal secretary.<sup>728</sup> This included explicit instructions as what the task included and was to be done.<sup>729</sup> This clarity in instruction was understood to be crucial factor when the delegating drafting of analysis and outcome of the arbitration.<sup>730</sup> An arbitrator with over two decades of experience clarified that all that she would delegate all those tasks that she was clear about.<sup>731</sup> An interviewee noted that it is a good practice to solicit templates from the arbitrator so that there is clarity on how to proceed and in a manner that decreases the work of the arbitrator.<sup>732</sup>

However, a clear step-by-step instruction was not common to every interviewee. As one arbitrator noted that good tribunal secretary does not require too much instruction.<sup>733</sup> And, as another arbitrator, with background as tribunal secretary and former head of IAC, put it subtly, that sometimes instructions are clear and sometimes they could get clearer.<sup>734</sup> Another arbitrator recounted having received directions in three ways.<sup>735</sup> First, where the outcome was disclosed but not the reasoning. Second, where neither outcome nor reasoning was disclosed but was later reviewed in depth including, where the initial outcome prepared by the tribunal secretary was reversed. Third, where the first draft was prepared in mixed fashion with some parts of drafting delegated to her as a tribunal secretary.

A tribunal secretary with experience of working with multiple arbitrators noted of one experience where she was requested to prepare the first draft as she thought fit but was

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<sup>726</sup> Interviewee # 35

<sup>727</sup> Interviewee # 31

<sup>728</sup> Interviewees # 2, 12, 13, 19, 22

<sup>729</sup> Interviewee # 2, 11, 12, 13, 22, 24, 29

<sup>730</sup> Interviewee # 12, 17, 24, 26, 29

<sup>731</sup> Interviewee # 15

<sup>732</sup> Interviewee # 10

<sup>733</sup> Interviewee # 10

<sup>734</sup> Interviewee # 19

<sup>735</sup> Interviewee # 31

subsequently reviewed.<sup>736</sup> Another tribunal secretary with experience of working with multiple arbitrators noted having received directions in two ways, where there was a clear instruction in terms of layout and where there were just broad ideas.<sup>737</sup> Another interviewee with experience of working with multiple arbitrators noted that for one arbitrator, she was expected to keep reminder of deadlines and work lockstep on each task while with another arbitrator, she was given clear tasks with clear expectations.<sup>738</sup> Another arbitrator with long experience as a tribunal secretary clarified that the personal style of each arbitrator mattered in terms of how work was coordinated.<sup>739</sup> Another interviewee noted that working multiple times with the same arbitrator, the need for detailed instructions diminish because of the past experience of working with them.<sup>740</sup>

What comes out clearly is that initiation of tasks is not necessarily a step-by-step guidance to the tribunal secretaries. Though, for many interviewees that was the case and yet, for others, it meant broad strokes of what was expected of them before reviewing the output. The initial guidance or direction therefore was not mechanical but, dependent on the nature of task, preferences of individual arbitrator as well as existing relationship with the tribunal secretary.

The carrying out of the task also meant frequent conversations that included clarifications, questions, discussions and even, for one interviewee, debate.<sup>741</sup> For instance, an interviewee clarified that the relationship with the arbitrator is based on trust and therefore, permits back and forth on any issue related to the task that comes up.<sup>742</sup> An arbitrator stated that she relied on the associates working at her firm as tribunal secretaries lead to ease of communication that involved the tribunal secretary apprising of any deadlines or pending issues as well as discussion on what is to be done.<sup>743</sup> This included discussions on any complex issue with as she put it the tribunal secretaries acting as a sounding board. One interviewee, an experienced arbitrator, specifically highlighted the benefit of junior associates as tribunal secretaries seeing supervision as akin to debate where the junior associate is able to bring benefit of fresh eyes

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<sup>736</sup> Interviewee # 24

<sup>737</sup> Interviewee # 14

<sup>738</sup> Interviewee # 5

<sup>739</sup> Interviewee # 27

<sup>740</sup> Interviewee # 19

<sup>741</sup> Code: Direction, Supervision & Revision

<sup>742</sup> Interviewee # 21

<sup>743</sup> Interviewee # 6

without interest in the case and due to their legal training to think as judges.<sup>744</sup> Another arbitrator recounted similar experience from her early years as a tribunal secretary where she noted that the arbitrator saw her appointment as an educational tool.<sup>745</sup> This included an explanation by the arbitrator as to the strengths and weaknesses in the case so that tribunal secretary could prepare the draft on those lines.<sup>746</sup>

To put it simply, the process of supervision is akin to a long conversation where the tribunal secretaries can seek clarifications and answers to any questions that they may have. And these conversations are not mechanical in the sense that the arbitrators too rely on the knowledge of the file that the tribunal secretary is expected to have in order to respond to any queries or request for further instructions.

Upon completion of the tasks, all interviewees, with experience as tribunal secretary or arbitrator, noted that there was always review by the arbitrators. An arbitrator with background as tribunal secretary emphasized that all established arbitrators always reviewed the task done by the tribunal secretary.<sup>747</sup> A tribunal secretary upon being asked whether her work was reviewed made a humorous remark that she was not fortunate that her work was accepted as it is.<sup>748</sup>

An arbitrator with background as tribunal secretary explained that her experience was sitting down with the arbitrator where they would then review the work done by the tribunal secretary line by line.<sup>749</sup> She noted that it was important that arbitrators understand the choices made by the tribunal secretary in their drafting responsibilities so that arbitrators can examine and review the submitted output in a manner that aligns their understanding with that of what tribunal secretary has produced. This was echoed by a tribunal secretary with experience of working with multiple arbitrators that one of them always reviewed her output line by line.<sup>750</sup>

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<sup>744</sup> Interviewee # 15

<sup>745</sup> Interviewee # 21

<sup>746</sup> Interviewee # 13

<sup>747</sup> Interviewee # 27

<sup>748</sup> Interviewee # 24

<sup>749</sup> Interviewee # 28

<sup>750</sup> Interviewee # 26

An interviewee narrated a recent experience involving corrections and changes to procedural history drafted by her.<sup>751</sup>

An arbitrator, with over three decades of experience, stated that her approach is to delegate significant portions of drafting because she carries out significant revisions by putting in the time to review the output of the tribunal secretary.<sup>752</sup> Similarly, another arbitrator also with background as tribunal secretary stated that as an arbitrator she reviews every detail and references in the work submitted by the tribunal secretary.<sup>753</sup>

Another interviewee, with over two decades of experience and having acted as both arbitrator and tribunal secretary, noted that high profile arbitrators delegate significant portions of work confining themselves largely to revisions of the drafts prepared by tribunal secretaries.<sup>754</sup> Similar observation was made by another interviewee, with background as both arbitrator and tribunal secretary, that arbitrators with large number of appointments at best draft the reasoning and analysis component of the award confining themselves to review of other parts of the award.<sup>755</sup> An arbitrator with over three decades of experience noted that her role is to review and review extensively all that is shared by the tribunal secretary.<sup>756</sup>

An interesting dynamic emerged between the arbitrators that had background as tribunal secretary in terms of their career trajectory. The established arbitrators, that is, who had been arbitrators for a long period of time and have had multiple appointments saw no difficulty in delegating tasks to tribunal secretaries.<sup>757</sup> On the other hand those tribunal secretaries that were in their early stages of arbitrator appointments, for instance, having smaller cases<sup>758</sup>, emphasized that they were reluctant to appoint tribunal secretaries because of significant time that would go in reviewing the output of the tribunal secretaries.<sup>759</sup>

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<sup>751</sup> Interviewee # 19

<sup>752</sup> Interviewee # 22

<sup>753</sup> Interviewee # 13

<sup>754</sup> Interviewee # 12

<sup>755</sup> Interviewee # 30

<sup>756</sup> Interviewee # 4

<sup>757</sup> Interviewee # 10, 31, 35

<sup>758</sup> Interviewee # 12

<sup>759</sup> Interviewee # 12, 19, 25, 27

The process of review and revision to the output of tribunal secretary was emphasized for tasks across the board but especially, in relation to the delegation of drafting. This was true irrespective of the extent of delegation of drafting. And both the arbitrators and tribunal secretaries emphasized this. There was not a single instance where interviewees indicated that their output was accepted without revision being carried out by the arbitrator.<sup>760</sup>

Three inferences can be drawn here:

first, that the principle of *intuitu personae*, that is, duty to decide is a shared value within the ICA community;

second, that this principle acts as a guiding principle that shapes the relationship between the arbitrators and tribunal secretaries and;

third, that this principle is carried out through direction, supervision and revision of the tasks delegated to the tribunal secretary.

It is necessary to acquaint with the case law on these issues before proceeding to sum up the principle of *intuitu personae* and direction, supervision & revision as a shared value among the ICA community. It is so because these cases and institutional rules act as external sanction in regulating the relationship between the tribunal secretaries and arbitrators.<sup>761</sup>

#### 6.2.4. INTUITU PERSONAE AND ITS APPLICATION TO ROLE AND SUPERVISION OF TRIBUNAL SECRETARIES AS AN INSTITUTION

The appropriate scope of duties and the manner of supervision of tribunal secretaries has also come up before various domestic State Courts. In each case, what is delegable and how delegation should be carried out was linked with the principle of *intuitu personae*, that is, the arbitrators cannot delegate decision-making to the tribunal secretaries. These cases are from different jurisdictions that have strong ties to the practice of ICA. The ICA community references them as part of its discussions on the role of tribunal secretaries and thus, their bricolage through comparative method reveals what the ICA community understands as binding.<sup>762</sup> It does this through identification of the *tronc commun*, that is, those aspects of law

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<sup>760</sup> Code: Direction, Supervision & Revision

<sup>761</sup> Kaczmarczyk and Lam, *supra* note 243.

<sup>762</sup> For a detailed discussion of cases that reflects this bricolage from various judgments, refer, Filip De Ly, *supra* note 211.; On how comparative method is central to ICA, refer, Joanna Lam, *supra* note 289.; Emmanuel Gaillard, *supra* note 296.

and its interpretation that are common.<sup>763</sup> This allows for comparative analysis across jurisdictions in order to understand what constitutes the institutions of ICA.<sup>764</sup>

Every case on the role and supervision of tribunal secretaries links it to the principle of *intuitu personae*, that is, the personal and non-delegable duty of the arbitrators to decide the case. The cases that have been brought before the Courts are in two contexts, namely, where an annulment of the award is sought or where the removal of the arbitrators have been sought on account of breach of this principle.

One of the earliest cases was before the *Cour d'Appel* of Paris where the party sought setting aside of an award arguing lack of due process and equal treatment on account of presence of the tribunal secretary at the oral hearing.<sup>765</sup> The *Cour d'Appel* of Paris dismissed the application arguing that the tribunal was entitled to secretary and that the party failed to establish “how he had interfered in the proceedings”.<sup>766</sup> That is, the Court refused to set aside the award because the party failed to show how the presence of tribunal secretary led to failure to discharge the arbitral mandate by the tribunal.

Similarly, the District Court of The Hague was called upon to decide an annulment proceeding in “IMS/Modsa I” where IMS, the applicant, argued that the arbitrators had failed to devote sufficient time to the proceedings because of disproportionate amount of time spent by the tribunal secretary.<sup>767</sup> IMS attempted to demonstrate this through the information it gained from ICC where it indicated over 1,000 hours spent by the tribunal secretary. The District Court rejected the argument stating that this was not sufficient to prove that the arbitrators had failed to devote sufficient time.<sup>768</sup> At core the argument was that the role of the tribunal secretary during the arbitration meant failure of the arbitrators to discharge their duties. The District Court rejected the argument because the party failed to show how the tribunal secretary was involved in decision-making.

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<sup>763</sup> Refer Section 3.3.; More specifically, Joshua Karton, *supra* note 291.

<sup>764</sup> Refer Section 3.2.4. for detailed discussion on Institutions. More specifically, Kaczmarczyk and Lam, *supra* note 243. Pg. 718 defines Institutions as “socially sanctioned patterns of behaviour that constitute significant functions of crucial sectors of the society.”

<sup>765</sup> Constantine Partasides, *supra* note 172. Pg 148 footnote 6

<sup>766</sup> FOUCARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, (Emmanuel Gaillard & John Savage eds., 1999). Para 1250; Decision of the Cour d'Appel of Paris, June 21, 1990

<sup>767</sup> Filip De Ly, *supra* note 211. Pgs. 39-40

<sup>768</sup> *Id.* Pgs 39-40

Similarly, in a case before the English High Court, Sonatrach the claimant sought setting-aside of the award on grounds that the tribunal secretary had exceeded the remit for its appointment on the grounds of preparation of internal notes.<sup>769</sup> The claimant had argued that the tribunal secretary had participated in the decision-making because the tribunal did not share the contents of the notes when requested by the claimant. The Court rejected this line of reasoning on the basis that the tribunal had assured that the tasks did not exceed the remit and that such notes being part of the tribunal's deliberations should remain secret.<sup>770</sup> The issue being that the preparation of internal notes for use by the tribunal during deliberations was argued to have exceeded the remit of not participating in the decision-making and thus as in the previous two cases, the duties of tribunal secretary were analyzed from the criterion of the personal mandate of decision-making by the tribunal. The Court in turn was unmoved noting that it was a standard practice in ICC arbitrations where the secretaries were tasked with writing of notes for the assistance of the tribunal.<sup>771</sup> The Court did not even go into the discussion of supervision of the tribunal secretary's work on this basis because it concluded that mere writing of notes was not sufficient to influence decision-making of the tribunal.

In another case before English High Court, P v. Q, the claimant argued for removal of two co-arbitrators (the presiding arbitrator having been replaced earlier by the LCIA Court on a different ground<sup>772</sup>) on the grounds of improper delegation of responsibilities to the tribunal secretary.<sup>773</sup> The claimant's case rested on solicitation of views of the tribunal secretary by the presiding arbitrator through an email that was inadvertently sent to the paralegal of the claimant's counsels.<sup>774</sup> Therefore, the claimant argued that the two co-arbitrators (who were not removed by the LCIA Court when they replaced the presiding arbitrator) had impermissibly delegated decision-making to the secretary. As a result, the claimant argued that they ought to be removed.<sup>775</sup> In order to substantiate its claim, the claimant relied on the difference between

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<sup>769</sup> Flaux J, *supra* note 684. Para 7

<sup>770</sup> *Id.* Paras 46-50

<sup>771</sup> *Id.* Para 48

<sup>772</sup> Popplewell J., *supra* note 648. Para 46, "there is in this case no basis for concluding that the Chairman's use of the Secretary in relation to the three Decisions involved delegating to the Secretary any adjudicative functions or responsibilities, or was in any way inappropriate."

<sup>773</sup> *Id.*

<sup>774</sup> *Id.* Para 10, "The Chairman's email, intended for the Secretary, attached the Claimant's lawyer's covering email and asked "Your reaction to this latest from [Claimant]?"

<sup>775</sup> *Id.* Paras 24, 27 and 29(1)

time spent by the co-arbitrators and the tribunal secretary on series of procedural orders already made by the tribunal.<sup>776</sup>

Popplewell J. delivered the judgment against the claimant. He rejected their argument on the grounds that mere comparison of time spent was insufficient to draw the inference of improper delegation of decision-making authority and that the co-arbitrators relied on the first draft prepared by the chair to make their comments on each of the procedural orders. He reasoned that as a practice the presiding arbitrator prepared the drafts upon which the co-arbitrators made their comments was acceptable conduct of co-arbitrators and did not lead to any inference against delegation of their decision-making in favor of the tribunal secretary.<sup>777</sup>

Popplewell J. at core recognized the issue citing the Sonatrach judgment<sup>778</sup> that there cannot be any delegation of decision-making by the arbitrators to the tribunal secretary. The implication being that the arbitrators, including the co-arbitrators, had the duty to make up their minds and decide the issue before them. As a corollary, if the parties showed that this decision-making function had been outsourced or delegated to the tribunal secretary, then, those decisions or as in this case, the arbitrators, could be challenged and removed. He concluded that this was not shown in this case and that there was careful supervision of the tribunal secretary's work.<sup>779</sup>

In a similar case before the Belgian Supreme Court, the losing party filed for annulment of the award because the arbitrators had improperly delegated their personal mandate to the tribunal secretary.<sup>780</sup> They grounded their argument on the basis that the tribunal secretary prepared questions for the expert witnesses on behalf of the chairman and that she was present during the deliberations and had assisted in drafting of the award. The chairman in return clarified that the entire award was reviewed by the tribunal and that the tribunal secretary never intervened during the deliberations. The Belgian Supreme Court refused to annul the award reasoning that

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<sup>776</sup> *Id.* Para 36

<sup>777</sup> *Id.* Paras 31-42

<sup>778</sup> *Id.* Para 35; Flaux J., *supra* note 684.

<sup>779</sup> Popplewell J., *supra* note 648. Para 70(2)

<sup>780</sup> Caroline Deves & Sam Vermeeren, *Green Light for Secretaries to Assist in Drafting Arbitral Awards so Long as Tribunals Call the Shots: Nothing New Under the Belgian Sun*, [https://www.houthoff.com/expertise/practice/arbitration/arbitration-blogs/green-light-for-secretaries-to-assist-in-drafting-arbitral-awards-so-long-as-tribunals-call-the-shots-nothing-new-under-the-belgian-sun.;](https://www.houthoff.com/expertise/practice/arbitration/arbitration-blogs/green-light-for-secretaries-to-assist-in-drafting-arbitral-awards-so-long-as-tribunals-call-the-shots-nothing-new-under-the-belgian-sun.); Benoît Allemeersch & Hannelore Buelens, *Delegation of Tasks to Arbitral Secretaries: Striking the Right Balance?*, <https://arbitrationblog.kluwerarbitration.com/2021/08/22/delegation-of-tasks-to-arbitral-secretaries-striking-the-right-balance/>.

preparation of list of questions as well as assistance in drafting of the award did not constitute improper delegation as the arbitrators had jointly contributed to the award after a thorough discussion. The Court stressed that their decision-making function is personal to them and cannot be carried out by any third party. This is because the arbitrators are appointed on basis of parties' contract making their mandate to be *intuitu personae* or in person.<sup>781</sup> Upon examination of the evidence, the Court refused to set-aside the award because it found that close supervision and review of the final award by the tribunal ensured that their adjudicatory mandate was fulfilled.<sup>782</sup>

A slightly different question arose before the Swiss Supreme Court where the award was challenged on the ground of improperly constituted tribunal because the sole arbitrator had appointed one tribunal secretary and one legal counsel to assist during the proceedings. The Swiss Supreme Court dismissed the challenge on the basis of having a tribunal secretary pithily noting that it did not call for any comment.<sup>783</sup> With regard to the support of legal counsel, the Court justified on the basis that the arbitrator can rely on third-party support in order to carry out the arbitration and moreover, both the parties were aware of the appointment of the tribunal secretary and legal counsel. The Court in order to arrive at this decision clarified the principle of *intuitu personae* and its relationship with the services of tribunal secretary. It stated that as long as the tribunal does not delegate the decision-making prerogative, it is permissible that it may appoint a tribunal secretary or solicit third-party assistance.<sup>784</sup>

#### 6.2.4.1. Yukos Arbitration and the role of the assistant

Perhaps, the most controversial and publicized case is that of the Yukos arbitration. In what has been termed the 'Trial of the Century' with extensive coverage on the changing face of politics and the relationship with the business elite in Russia, 'the Yukos Affair' also inadvertently concretized the term 'Tribunal Secretary'.<sup>785</sup> Very briefly, in 2014, the Permanent Court of Arbitration in The Hague issued an award of \$50bn against Russia making it the

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<sup>781</sup> Emek Insaat Sti Ltd against European Union, *supra* note 648. Para 45

<sup>782</sup> *Id.*

<sup>783</sup> A. \_\_\_\_\_ SA v. B. \_\_\_\_\_ Sàrl, *supra* note 639.

<sup>784</sup> *Id.* Para 3.2

<sup>785</sup> RICHARD SAKWA, PUTIN AND THE OLIGARCH: THE KHODORKOVSKY-YUKOS AFFAIR (2014). For greater discussion on the evolution of politics and business in Russia through the lens of Yukos Affair.; How one word in a treaty could cost Russia billions for seizing Yukos Economist 2020; Jensen, *supra* note 545.

largest awards ever.<sup>786</sup> Consequently, the Russian government challenged the award before the domestic courts in Netherlands on number of grounds among them was the improper use of tribunal secretary by the arbitral tribunal to draft the award.<sup>787</sup>

Among the four grounds of challenging the award before the District Court of the Hague was that the tribunal violated its *intuitu personae* mandate that required them to fulfill their role as arbitrators personally.<sup>788</sup> Russia argued that the tribunal secretary had carried out substantive role in the arbitration proceedings and thereby, breached the tribunal's personal mandate to perform these tasks.<sup>789</sup> It grounded this argument on five evidences, namely,

First - that the duties of administrative nature were already carried out by the secretariat of the Permanent Court of Arbitration, where the arbitration was seated;<sup>790</sup>

Second - that the original representation made by the president of the tribunal suggested a very limited role of the tribunal secretary as being the person to be contacted in view that the chair of the tribunal is inaccessible without having a specific mention of his role as a formal assistant or secretary to the tribunal;<sup>791</sup>

Third - the amount of fees charged by the tribunal secretary amounted to excess of 1 million US dollars;<sup>792</sup>

Fourth - the overall and progressive increase in time devoted by the tribunal secretary as the proceedings carried on with over 3,000 hours, far in excess of any other arbitrator;<sup>793</sup>

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<sup>786</sup> Bermann, *supra* note 426.

<sup>787</sup> *Id.*; <https://www.ibanet.org/article/B55CB7F1-01C6-4BDF-9383-90F567C17147>; Sophie Nappert & Yulia Selivanova, *Russia's Policy on International Investment Agreements: Reflections After The Yukos Awards*, in THE LEADING PRACTITIONERS' GUIDE TO INTERNATIONAL OIL & GAS ARBITRATION 425 (James Gaitis ed., 2015). Pgs. 502-504

<sup>788</sup> Sophie Nappert and Yulia Selivanova, *supra* note 787. Pgs. 502-504

<sup>789</sup> *Id.* Pgs 502-504

<sup>790</sup> Expert Opinion of Professor George A Bermann (Hulley Enterprises and Ors. v. The Russian Federation 1:14-CV-01996-ABJ), *supra* note 15. Para 99, "The Tribunal may appoint a member of the Registry to act as Administrative Secretary. The Administrative Secretary and other members of the International Bureau [of the PCA] shall carry out *administrative* tasks on behalf of the Tribunal (emphasis added)."

<sup>791</sup> *Id.* Paras 100-102 citing the advice of the chairman to the parties, "It may come to pass that you wish to find out something with respect to the tribunal that Brooks Daly might not be aware of. Martin at my office in Montreal could be reached and hopefully will have the answer for you (emphasis added)."

<sup>792</sup> *Id.* Para 108

<sup>793</sup> *Id.* Para 112

Fifth - an analysis by linguistics expert that concluded it being extremely likely that the tribunal secretary wrote majority of three substantive sections of the Final Award.<sup>794</sup>

Though, the evidence on which the argument was grounded was indeed novel, especially, the reliance on the linguistic expert to analyze the drafting of the final award but the core of the argument was essentially the same that the principle of *intuitu personae* had been breached due to over-delegation to the tribunal secretary.<sup>795</sup>

Thus, Yukos decision was a watershed in the discussion on the tribunal secretaries leading to flurry of articles and conferences discussing the appropriate role and its limitations.<sup>796</sup> At core was the prescient warning of Zachary Douglas given the same year as the final award was issued that there is always a possibility of perfect storm where the hidden tribunal secretary is subpoenaed as part of an annulment proceedings.<sup>797</sup> Though, to be fair, Douglas' argument was in context of a hidden or shadow tribunal secretary, that is, unknown to the parties that he existed.

But, the concern is the same: of over-delegation of the personal mandate by the arbitrator or the tribunal and lack of supervision and control over the secretary's output. Prof. Albert Jan van den Berg appearing for the claimant to set-aside the award argued that the "Arbitrators have not fulfilled their mandate personally". He argued that the tribunal secretary was not appointed for the expansive tasks he had carried out demonstrated by the total amount of time spent by the tribunal secretary, that overshot each arbitrator's total time spent, and increased

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<sup>794</sup> *Id.* Para 118 "Dr. Chaski's Report concludes that it is "extremely likely" that Mr. Valasek wrote the majority of at least three substantive - and unquestionably vital - sections of the Final Awards, namely, 78.57% of the Preliminary Objections section, 65.38% of the Liability section and 71.43% of the Quantification of Claimant's Damages."; for a critical appraisal of the linguistic analysis as a means of evidence, refer J. OLE JENSEN, *supra* note 18. Paras 9.36-9.42

<sup>795</sup> Sophie Nappert and Yulia Selivanova, *supra* note 787.; Expert Opinion of Professor George A Bermann (Hulley Enterprises and Ors. v. The Russian Federation 1:14-CV-01996-ABJ), *supra* note 15.; Bermann, *supra* note 426.;

<sup>796</sup> Sophia Elisabeth Von Dewall, *Tribunal Secretaries: How to Prevent a Friend from Turning into a Foe?*, in ARBITRAL SECRETARIES: REPORTS FROM THE JOINT NAI-CEPANI COLLOQUIUM, OCTOBER 5, 2017 69 (Filip De Ly & Luc Demeyere eds., 2018).; Maarten Draye and Emily Hay, *supra* note 174.; Hans-Patrick Schroeder & Wolfgang Junge, *Tribunal Secretaries Re-Examined—Comparative Legal Framework, Best Practices, and Terms of Appointment*, 38 ARBITRATION INTERNATIONAL 21 (2022).; Markus Altenkirch & Benedic Schmeil, *The Substantial Involvement of Arbitral Secretaries*, (2015), <https://www.globalarbitrationnews.com/2015/09/17/the-substantial-involvement-of-arbitral-secretaries-20150917/> (last visited Mar 27, 2023).; Omar Puertas and Borja Álvarez, *supra* note 426.; George A Bermann, *supra* note 373.; Dmytro Galagan & Patricia Živković, *The Challenge of the Yukos Award: An Award Written by Someone Else – a Violation of the Tribunal's Mandate?*, <https://arbitrationblog.kluwerarbitration.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/>.

<sup>797</sup> Zachary Douglas, *supra* note 14. Pgs 87-88

progressively at the time of issuance of awards.<sup>798</sup> He argued that this together led to the inference that the tribunal had over-delegated their personal mandate of deciding the arbitration.

The District Court set-aside the award on different grounds and therefore, did not address the argument around the tribunal secretary.<sup>799</sup> Prof. Berman, also acting as an expert witness for the Russian Federation in a parallel proceedings before US District Court, has argued that if the District Court had examined the issue, it would have shown a very problematic situation with the tribunal's functioning.<sup>800</sup>

#### 6.2.4.2. Summing up the proceedings before the Courts

The case law on tribunal secretary have three consistent components. The first being either the parties' have sought annulment of award<sup>801</sup> or the removal of the arbitrators,<sup>802</sup> the second being to argue it on the basis of violation to carry out the duty of decision-making associated with the arbitrator's mandate and third, the centrality of the role of supervision and critical review of the secretary's output.

The Courts in each case were unanimous in stating that the duty to decide the arbitration was personal to the arbitrators and as a result, could not be delegated to a third party and thus, terming it *intuitu personae* or 'in person'.<sup>803</sup> The Courts were also of the same position when it came to supervision that if effective supervision was carried out by the arbitrator or the tribunal, then, no inference as to breach of this personal mandate could be drawn.<sup>804</sup> These are the *tronc commun* of the cases discussed that are the reasons of these Court decisions being common to all and therefore, elucidation of the principle of *intuitu personae* as well as understanding

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<sup>798</sup> Albert Jan van den Berg, *Oral Argument Presentation before the District Court of The Hague*, (2016), <https://www.italaw.com/sites/default/files/case-documents/italaw7256.pdf> (last visited Mar 24, 2023). Slides 16-22

<sup>799</sup> George A Bermann, *supra* note 373.

<sup>800</sup> *Id.* Pg. 20

<sup>801</sup> Decision of the Cour d'Appel of Paris, June 21, 1990; Filip De Ly, *supra* note 211.; Flaux J., *supra* note 684.; Emek Insaat Sti Ltd against European Union, *supra* note 648.; A.\_\_\_\_\_ SA v. B.\_\_\_\_\_ Sàrl, *supra* note 639.; George A Bermann, *supra* note 373.;

<sup>802</sup> Popplewell J., *supra* note 648.

<sup>803</sup> Emek Insaat Sti Ltd against European Union, *supra* note 648.; A.\_\_\_\_\_ SA v. B.\_\_\_\_\_ Sàrl, *supra* note 639.; Popplewell J., *supra* note 648.

<sup>804</sup> Emek Insaat Sti Ltd against European Union, *supra* note 648.; Popplewell J., *supra* note 648.; A.\_\_\_\_\_ SA v. B.\_\_\_\_\_ Sàrl, *supra* note 639.

within the ICA community.<sup>805</sup> That is, by comparing the rules and the case laws, the ICA community determines whether the principle so stated is widely supported.<sup>806</sup> This is revealed in the writings of its practitioners, judicial pronouncements of domestic Courts and institutional rules<sup>807</sup> in respect of the principle of *intuitu personae* and its practice through effective direction, supervision and revision of the tasks of the tribunal secretary.

For instance, the Swiss Supreme Court stated that the person being appointed as an arbitrator is tasked with decision-making of that particular arbitration and thus, this mission is eminently personal or *intuitu personae*. The consequence being that the arbitrator is under the duty to know the file, deliberate and participate in the decision-making while maintaining the intellectual control of the dispute.<sup>808</sup> In turn, it included assistance by the tribunal secretary as long as it was under the control of the tribunal.<sup>809</sup>

The Belgian Supreme Court clarified that the source of this personal mandate is the parties' contract to arbitrate under which that particular arbitrator or the tribunal is personally entrusted to fulfill the mission of resolving the dispute.<sup>810</sup> That is, the arbitrator's gain this personal mandate on account of the very same contract that leads to the arbitration. Additionally, the Court clarified there is no failure of this decision-making mandate by the tribunal as long as proper review and correction of the output, including notes and memorandums by the tribunal secretary, is carried out.<sup>811</sup>

Thus, to put it simply, the second component of these cases is that there exists a clear duty on the arbitrator or the tribunal to decide a case that includes both knowledge of the proceedings, conducting the proceedings and having an intellectual control over the decision-making. Since, the mandate of the arbitration arises from the very same source of party's agreement to arbitrate, the arbitrators cannot delegate this core function.

The dynamic of this principle in relation to the role of tribunal secretaries depends on the control over the tasks delegated to them. This control involves supervision of the tasks given

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<sup>805</sup> Joshua Karton, *supra* note 291.; Filip De Ly, *supra* note 211.; Chloe J Carswell and Lucy Winnington-Ingram, *supra* note 426.

<sup>806</sup> Emmanuel Gaillard, *supra* note 296. Pg. 66

<sup>807</sup> Refer Section 6.2.5.

<sup>808</sup> A. \_\_\_\_\_ SA v. B. \_\_\_\_\_ Sàrl, *supra* note 639. Para 3.2.2

<sup>809</sup> *Id.*

<sup>810</sup> Emek Insaat Sti Ltd against European Union, *supra* note 648.

<sup>811</sup> *Id.*

to the secretaries and critically reviewing them before the tribunal adopts them. The implication being that there is no breach of arbitrator's mandate when there is proper control over the tasks delegated to the tribunal secretary.

What the Court proceedings therefore add to this discussion is that the values espoused by the practitioners are expected and as the cases revealed, practiced because in none of the cases the Courts found breach of the principle of *intuitu personae* on account of improper delegation or conduct of the tribunal secretaries.<sup>812</sup> And failure to do this (though none of the cases found such a breach) may lead to either setting-aside of the award or removal of the arbitrators. Thus, the principle of *intuitu personae* and the concomitant need for proper supervision over the tribunal secretary's tasks are also institutionalized because if the parties establish that the value of *intuitu personae* was violated or breached then the award itself can be set-aside.<sup>813</sup>

Put together with the discussion in the previous sub-section, the triangle of value, practice and institution is discernable with regard to the personal mandate of the arbitrator or the tribunal and the need for maintaining a supervisory control over the tasks delegated to the tribunal secretary.

#### 6.2.5. INSTITUTIONALIZATION OF SUPERVISION BY THE ARBITRAL INSTITUTIONS

The English High Court drew an effective distinction between the adjudicatory function and process when discussing the role of tribunal secretary to discern the responsibilities and the method of delegating those responsibilities by the tribunal.<sup>814</sup> Popplewell J. argued that adjudicatory function involves forming independent judgment and impermissibility of delegation arises when this function is delegated to the tribunal secretary as opposed to merely being involved in tasks that formed part of the overall process of arbitration.<sup>815</sup> What Popplewell J. was referring to carrying out series of micro-tasks that form the process of arbitration and hence, are susceptible to delegation without actually, delegating the decision-making itself.

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<sup>812</sup> Kaczmarczyk and Lam, *supra* note 243.; Jeffrey Dunoff and Mark Pollack, *supra* note 12.; Jeffrey Dunoff and Mark A. Pollack, *supra* note 270.

<sup>813</sup> On practical difficulty of proving such allegations, refer J. OLE JENSEN, *supra* note 18. Para 9.46-9.47 “Does this ‘proof conundrum’ justify lowering the standards of proof or encroaching upon the secrecy of deliberations? The present book answers ‘no’.”

<sup>814</sup> Popplewell J., *supra* note 648. Para 67

<sup>815</sup> *Id.*

The Belgian Supreme Court similarly upheld an award recognizing that as long as there is personal examination of the case as well as review of the work done by the tribunal secretary, the *intuitu personae* mandate of the arbitral tribunal is not breached.<sup>816</sup> The Supreme Court upheld an interpretation of the ICC Practice Notes that allowed the tribunal secretary to prepare drafts and be present during deliberations as long as all the tasks were personally reviewed by the arbitral tribunal.<sup>817</sup>

The Swiss Supreme Court too recognized that the tribunal secretary, akin to a law clerk in domestic courts, can be retained by the arbitral tribunal as long as the tasks carried out by the secretary remain under the control of and direction of the arbitral tribunal.<sup>818</sup>

The three cases together therefore allow for series of tasks to be delegated to the tribunal secretary as long as the arbitral tribunal exercises control and direction over the secretary's output. In effect, it means that the output of the secretary is determined by the arbitral tribunal through direction and therefore, is subject to scrutiny by the tribunal after the secretary submits the requested work.<sup>819</sup>

Similarly, International Arbitration Centers [hereinafter, IACs] specifically recognize the obligation of supervision on the part of arbitral tribunal when it chooses to appoint a tribunal secretary. The ICC Practice Notes specifically states that the tribunal secretaries are to "act upon the arbitral tribunal's instructions and under its strict and continuous supervision" with the arbitral tribunal being responsible for the secretary's conduct.<sup>820</sup> It also clarifies that the delegation of tasks to the tribunal secretary does not release the tribunal from "its duty to personally review the file and/or draft itself any arbitral tribunal's decision".<sup>821</sup> The Belgian Supreme Court upheld the interpretation of this provision as meaning that the arbitral tribunal does not breach its *intuitu personae* mandate as long as there is adequate review and supervision of the tribunal secretary's work.<sup>822</sup>

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<sup>816</sup> Emek Insaat Sti Ltd against European Union, *supra* note 648.

<sup>817</sup> *Id.*

<sup>818</sup> A.\_\_\_\_\_ SA v. B.\_\_\_\_\_ Sàrl, *supra* note 639.

<sup>819</sup> Popplewell J., *supra* note 648. Where the arbitrators stated that every line of the drafts submitted by the tribunal secretary was reviewed by the arbitral tribunal upon which the Court ruled against the claimant's request for removal of arbitrators.

<sup>820</sup> International Chamber of Commerce, *supra* note 434. Article 222

<sup>821</sup> *Id.* Article 223

<sup>822</sup> Emek Insaat Sti Ltd against European Union, *supra* note 648.

Similarly, HKIAC in its Guidelines begins the section on duties with specifically requiring the tribunal secretary to act under the tribunal's instruction and strict supervision while not exceeding the scope of tasks that assigned by the tribunal.<sup>823</sup> It simultaneously mandates that the decision-making function shall not be delegated by the arbitral tribunal to the secretary.<sup>824</sup>

The LCIA Rules and Guidance Notes specifically states that the tribunal secretary shall act under the supervision of the arbitral tribunal and that all tasks are carried out under specific instruction of the tribunal.<sup>825</sup> The tribunal is also prohibited from delegating any decision-making function.<sup>826</sup>

Similarly, the SCC Rules also require that the decision-making function is not delegated by the arbitral tribunal to the tribunal secretary and that all tasks carried out by the tribunal secretary must be under instruction and supervision of the arbitral tribunal.<sup>827</sup>

Put together, the requirement of instruction, supervision and verification required by the guidelines of various IACs fit in with the judicial pronouncements as well as writings of the ICA community. They together therefore reflect that direction, supervision and revision exercised by the arbitral tribunal over the tribunal secretary is a value, practice and institution.<sup>828</sup> It is not merely articulated as an idea but is also a practice that in non-compliance may lead to sanctions.

Additionally, this requirement of supervision is also not a soft law lacking normativity.<sup>829</sup> The Court pronouncements reveal that the delegation of task to a tribunal secretary is predicated upon supervision and verification. In the absence of the supervision or verification, an inference could be made against the tribunal for breach of *intuitu personae*.<sup>830</sup>

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<sup>823</sup> Hong Kong International Arbitration Centre, *supra* note 447. 3.1

<sup>824</sup> *Id.* 3.2

<sup>825</sup> LCIA Arbitration Rules, 2020, [https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2020.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx). Article 14A(14.8); LCIA Guidance Note for Parties and Arbitrators, <https://www.lcia.org/adr-services/guidance-note.aspx>. para 201

<sup>826</sup> LCIA Arbitration Rules, 2020, *supra* note 825. Article 14A(14.8)

<sup>827</sup> JAKOB RAGNWALDH, FREDRIK ANDERSSON, AND CELESTE E. SALINAS QUERO, *supra* note 490. Article 24

<sup>828</sup> Kaczmarczyk and Lam, *supra* note 243.

<sup>829</sup> FELIX DASSER, *supra* note 279.

<sup>830</sup> Emek Insaat Sti Ltd against European Union, *supra* note 648.; Popplewell J., *supra* note 648.;

#### 6.2.6. SUMMING UP: PRINCIPLE OF *INTUITU PERSONAE* AND DIRECTION, SUPERVISION & REVISION

The key question therefore that needs to be addressed in view of the principle of *intuitu personae* that requires the arbitrators to personally carry out their decision-making mandate and that of their ability to rely on tribunal secretary's support is the method of direction, supervision and revision.

This requires a conceptualization of what constitutive ingredients are of an effective control. This is relevant for two reasons, namely, first to identify what is necessary for an effective control in whose absence there would be a breach of the arbitrator's mandate and second, to be able to present an analysis of the practice of being a tribunal secretary reveals. The second part is important in as much it goes to the core of the inquiry of this thesis how tribunal secretaries act in their day to day work responsibilities.

In order to be able to do so, this thesis builds upon the three-step conceptualization offered by Ole Jensen of instruction, supervision and verification to ascertain how the tasks are given, supervised and once completed how are they reviewed.<sup>831</sup>

As discussed earlier, the three steps that the empirical study revealed were direction, supervision and revision. Direction means request for initiation of tasks. Though, it may include step by step guidance as Ole Jensen states it be<sup>832</sup> but also includes implicit understanding on account of past experience as well as broad strokes as to the task that needs carrying out. It also includes specific instructions to proofread something prepared by the arbitrator in order to benefit from the tribunal secretary's knowledge of the file where it is the role of the tribunal secretary to point out any inconsistencies or if absence of a relevant point.<sup>833</sup> In other words, initiation of task maybe based on prior understanding between the arbitrator and tribunal secretary or requiring initiation of task that did not include detailed guidance. The Swiss Supreme Court decision is instructive in this regard as it acknowledges the role of the tribunal secretary as long as it is the tribunal that has full control over the decision-making.<sup>834</sup>

Similarly, supervision involved not only seeking clarifications by the tribunal secretaries but included, discussions and conversations with the arbitrator. There is a fluidity as to this

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<sup>831</sup> J. OLE JENSEN, *supra* note 18. Paras 5.261-5.264; 8.12-8.14; 8.44

<sup>832</sup> *Id.* Para 5.261

<sup>833</sup> Refer Chapter 5 for detailed discussion on knowledge of the file.

<sup>834</sup> A. \_\_\_\_\_ SA v. B. \_\_\_\_\_ Sàrl, *supra* note 639.

intermediate stage that does include, soliciting answer to any questions but also includes broader discussion on various facets of the proceedings and tasks delegated to the tribunal secretary. This fluidity of the intermediate stage therefore is different from the supervision as conceptualized by Ole Jensen that involves where the secretary may want to discuss any potential errors or difficulty carrying out the original instructions.<sup>835</sup> This broadening of the stage of supervision to include discussions corresponds to the practice as revealed by the empirical study.<sup>836</sup> It is therefore, for this thesis, the stage of supervision corresponds to series of conversations, including solicitation of answers to questions, that arises between the tribunal secretary and the arbitrator.

The step of revision is the final step when the tribunal secretary puts the completed task to the arbitrator for review. This includes verifying the submitted task by the arbitrator in terms of directions given to the tribunal secretary. But it also involves cross-checking the output against the arbitral record as well as making further changes to the output that may not have been part of the original direction but is carried out as part of decision-making by the arbitrator. Thus, it is different from the concept of verification that is restricted to exercising scrutiny over the tribunal secretary's task.<sup>837</sup> For instance, in the case *P v. Q*, the English High Court rejected the challenge against the arbitrators on the ground that they had reviewed the procedural orders and as part of that review adopted the orders as their own.<sup>838</sup>

Put together, this three-step conceptualization affords the possibility of ascertaining how the arbitrators and tribunal secretaries navigate their relationship from the outset - from the moment tasks are initiated to the intermediary stage of supervision to the final stage of revision. By being able to conceptualize it in this three-step manner, the practice of being a tribunal secretary can also be ascertained in as much as how they carry out the responsibilities given to them.

A clear inference that can be drawn here is that the principle of *intuitu personae* or the eminently personal mandate of the arbitrator to decide the dispute is a shared value, institutionalized by sanction and practiced through direction, supervision and revision of the output of the tribunal secretary. This principle acts as a validating idea for delegation of tasks

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<sup>835</sup> J. OLE JENSEN, *supra* note 18. Para 5.262

<sup>836</sup> Refer Section 6.2.3.

<sup>837</sup> J. OLE JENSEN, *supra* note 18. Para 5.263

<sup>838</sup> Popplewell J., *supra* note 648. Paras 38-39.

to the tribunal secretary through carrying out of effective supervision.<sup>839</sup> It is through the articulation of this principle and the concomitant understanding of supervision is the role of tribunal secretary justified and explained. It is also a causal idea that in turn effects the practice of supervising and controlling the tribunal secretary's work. In this manner, it is part of the episteme of ICA community and a shared value that it strives to adhere to.<sup>840</sup>

The principle of *intuitu personae* is institutionalized through the duty on the arbitrators to effectively supervise the output of the tribunal secretary.<sup>841</sup> This is reflected in the case law as well as the institutional rules and guidelines that together reveal the normativity behind this principle whose breach may lead to sanction of either setting aside the award or removal of the arbitrators.

Finally, as the empirical study shows, this principle and direction, supervision and revision of the output of the tribunal secretary is part of the practice of being tribunal secretary. It is central to the role of the tribunal secretary to act as per the directions of the arbitrators and it is a responsibility of the arbitrators to review the output of the tribunal secretary before adopting it.

### **6.3. PRACTICE OF BEING A TRIBUNAL SECRETARY: DRAFTING**

The earliest discussions on the use of tribunal secretary stemmed from the concern as to their role in drafting.<sup>842</sup> Series of anecdotes have accompanied this concern, including those where the tribunal secretaries aggrandized the drafting of the final award.<sup>843</sup> One of the earliest such anecdotes was recorded by Thomas Clay in his dissertation, cited by Constantine Partasides, where a competent arbitrator appointed as a secretary drafted the award in place of the arbitrator who had “consumed a non-negligible quantity of alcohol”.<sup>844</sup>

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<sup>839</sup> Andrea Bianchi, *supra* note 25.

<sup>840</sup> *Id.*; Kaczmarczyk and Lam, *supra* note 243.

<sup>841</sup> Kaczmarczyk and Lam, *supra* note 243.

<sup>842</sup> For instance, Constantine Partasides, *supra* note 172.

<sup>843</sup> For a reference to such anecdotes, Zachary Douglas, *supra* note 14. Noting receiving a unsolicited list of awards drafted by a former tribunal secretary seeking job; Aksen, *supra* note 628. In the opening paragraph; J. OLE JENSEN, *supra* note 18. Para 5.258 noting the complaints of discernable difference in the quality of writing in final award reflecting both lack of synthesis and multiple authorship; For a serious challenge on delegation of decision-making refer the ground on linguistic analysis taken by the Russian Federation in challenging the final award in Yukos arbitration as discussed in the Expert Opinion of Professor George A Bermann (Hulley Enterprises and Ors. v. The Russian Federation 1:14-CV-01996-ABJ), *supra* note 15.

<sup>844</sup> Constantine Partasides, *supra* note 172. Pg 150 footnote 17

This section commences by differentiating the drafting responsibilities into three broad headings. This is to differentiate the relationship of a particular drafting responsibility with the stage at which the draft is prepared as well as its relationship with the principle of *intuitu personae*.

It thereafter proceeds to discuss the results from the empirical study. It involves discussion on how the drafting tasks are viewed and understood by both those that act as tribunal secretaries and those that act as arbitrators. It involves a fine-grained analysis of each type of drafting that is delegated to them, including what it constitutes and the reasoning behind such delegation. It thereafter discusses how the instruction, supervision and verification occurs in practice.

### 6.3.1. THREE BROAD DRAFTING RESPONSIBILITIES

All drafting responsibilities, excluding the preparation of internal notes, can be divided broadly in three categories, namely, drafting of procedural orders; drafting of the factual and procedural background of the award and; drafting of the legal reasoning, merits and dispositive part of the final award or substantive procedural order. An award is the final and binding decision that resolves the dispute submitted to the tribunal whereas, a substantive procedural order decides a point of procedure during the course of proceedings that doesn't prejudge or resolve the dispute.<sup>845</sup>

UNCITRAL Notes on Organizing the Arbitral Proceedings, 1996 in its discussion, while recognizing a clear divergence of opinions, presents two drafting tasks that may be carried out by the tribunal secretaries: preparation of drafts of procedural orders and factual parts of the final award.<sup>846</sup> Needless to say the third responsibility would be the reasoning or the merits section of the award and where a procedural order decides a substantive issue in the proceedings.<sup>847</sup> Similarly, the Joint Report listed two broad drafting responsibilities - first, preparation of procedural orders and second, drafting of interim and final awards.<sup>848</sup> While the

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<sup>845</sup> For instance, interim measures lie preserving the evidence, freezing of assets are examples of substantive procedural order, refer, Alan Redfern, *Interim Measures*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 367 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014). Pgs. 372, 390; Bernardo M. Cremades, *supra* note 639. Pg. 814 for definition of an arbitral award.

<sup>846</sup> UNCITRAL Notes on Organizing Arbitral Proceedings, 1996, *supra* note 638. Para 27

<sup>847</sup> For instance, where the arbitrators decide to rule on their jurisdiction before proceeding to merits, Sigvard Jarvin & Alexander G. Leventhal, *Objections to Jurisdiction*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 507 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014). Pg. 512

<sup>848</sup> Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York city Bar Association, *supra* note 639. Appendix

report did not divide the responsibilities it further but confined itself as a checklist of two headings yet, the report was clear as to the fact that the decision-making responsibilities of the arbitral tribunal should not adversely influenced.<sup>849</sup> Thus, again the drafting of the substantive procedural orders and awards can be further sub-divided into two constituents - first, involving the procedural history and facts and the second, involving the analysis and decision-making.

Similarly, the Young ICCA Survey found support for drafting procedural orders but with respect to the final award, the answer was mixed. While 84.9% of respondents supported drafting of procedural background, 69.4% supported drafting of factual background and 65.3% supported drafting of parties' positions but only 31.9% supported the drafting of legal reasoning.<sup>850</sup>

This differentiated responsibilities also reflect the normativity of the principle of *intuitu personae* with regard to drafting responsibilities.<sup>851</sup> Ole Jensen lists these tasks in a traffic-light scale ranging from what he terms green light where undisclosed assistance should be acceptable to orange light requiring formal appointment of tribunal secretary to the red light requiring specific and informed party consent.<sup>852</sup> He discusses the drafting responsibilities in his traffic light scale dividing drafting responsibilities on the basis of party consent and instruction, supervision and direction of differing parts of the procedural orders and the final award.<sup>853</sup> The distinctions that he proposes is based on the relationship of the task with that of the personal mandate of the arbitral tribunal with those tasks being more closer to the mandate requiring greater supervision from the tribunal, formal appointment of the tribunal secretary and informed consent from the parties. That is, there is an ascending requirement of disclosure of the tribunal secretary and specific consent on tasks as these tasks become more related to the personal mandate of the arbitral tribunal. Therefore, for instance, ordinary tasks like preparation of front page of the award or procedural history without reasoning as being green listed and lacking the need for formal appointment; tasks like summarizing of parties' positions and drafting procedural orders and decisions under instruction, supervision and verification of the tribunal being orange listed and requiring formal appointment of the tribunal secretary; and

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<sup>849</sup> *Id.*

<sup>850</sup> YOUNG ICCA GUIDE, *supra* note 388. Pg. 15

<sup>851</sup> Pierre Tercier, *supra* note 9.; Jensen, *supra* note 545.

<sup>852</sup> Jensen, *supra* note 545.

<sup>853</sup> J. OLE JENSEN, *supra* note 18. Appendix E, pgs. 411-414

finally tasks like drafting the operative parts of the decision requiring specific consent from the parties being red listed requiring further specific informed consent from the parties.<sup>854</sup>

The crucial distinction, therefore, is that how a particular drafting responsibility interacts with the principle of *intuitu personae* and thus, warranting specific decision from the tribunal. Therefore, the drafting responsibilities can be understood in three broad categories, namely, drafting boilerplate procedural orders, drafting procedural history, summaries of parties' positions and factual background and, drafting reasoning and analysis for substantive procedural orders and the arbitral award.<sup>855</sup>

### 6.3.2. DISCUSSION FROM THE EMPIRICAL STUDY

All interviewees, except one, were involved in drafting in some manner and all interviewees had experienced proceedings where tribunal secretaries were involved in some form of drafting.<sup>856</sup> This response was consistent across the board for both with experience as tribunal secretaries and arbitrators. The only interviewee that was not involved in drafting as tribunal secretary explained being barred under the rules of the institution under which the arbitration was being conducted.<sup>857</sup> However, she acknowledged having witnessed tribunal secretaries being given drafting responsibilities and recognized the benefits of their role in the summarization of facts and parties' positions as being helpful for carrying out her own drafting.<sup>858</sup> This so because those arbitrators that had preference to draft line by line preferred summaries from the record to assist them in their writing as opposed to delegating a preliminary draft.<sup>859</sup> To put it simply, drafting responsibility is understood and practiced as a *raison d'être* for the appointment of tribunal secretaries.<sup>860</sup>

This was so because of the reasons of efficiency where the arbitrators knew precisely what tasks were outsourced and where their intervention was required and thus, leaving the

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<sup>854</sup> Jensen, *supra* note 545.

<sup>855</sup> Bernardo M. Cremades, *supra* note 639.; Alan Redfern, *supra* note 845. For interim measures as examples of substantive procedural orders; Paulo Michele Patocchi and Robert Briner, *supra* note 685. And Albert Jan van den Berg, *supra* note 645. For procedural orders and conduct of an arbitration proceeding.

<sup>856</sup> Code: Drafting; A total of twenty-seven interviewees discussed drafting responsibilities.

<sup>857</sup> Interviewee # 9

<sup>858</sup> Interviewee # 9

<sup>859</sup> Interviewee # 15

<sup>860</sup> Code: Drafting

preparation of first drafts to the tribunal secretaries.<sup>861</sup> Similarly, the tribunal secretaries saw the benefit of their appointments at the commencement of the arbitration as providing efficiency in the proceeding.<sup>862</sup> The efficiency element meant that the tribunal could focus on any contentious issue that maybe present during pre-hearing stage.<sup>863</sup> In this way, they were also analogized to clerks working for judges that carried out similar responsibilities of boilerplate drafting that required minimal attention from the judges.<sup>864</sup> An arbitrator with over three decades of experience analogized the tribunal secretary to an associate at law firm who would be tasked with preliminary drafting.<sup>865</sup> One interviewee, a tribunal secretary, made an astute observation that because most arbitrators had long experience as lead counsels or partners at law firms and no longer expected to work on a blank sheet because of habituation of building their work upon something already prepared beforehand.<sup>866</sup>

All interviewees, both the tribunal secretaries and the arbitrators who worked with them, reported that the tribunal secretary was expected to work directly for the presiding arbitrator in case of a three member tribunal.<sup>867</sup> While, it was acknowledged that the co-arbitrators may delegate some tasks to the tribunal secretary, it was understood that the tribunal secretary would primarily work under supervision of the presiding arbitrator.<sup>868</sup> This meant that the tribunal secretary was expected to first share the drafts with the presiding arbitrator who then in turn would circulate it to the rest of the tribunal.<sup>869</sup> The arbitrators themselves shared this understanding acknowledging that the preliminary draft to be shared with co-arbitrators originated from the presiding arbitrator and the presiding arbitrator would accordingly direct the tribunal secretary.<sup>870</sup>

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<sup>861</sup> Interviewees # 4, 6, 10, 12, 15, 22, 25, 30

<sup>862</sup> Interviewees # 3, 5, 11 18, 19, 20, 21

<sup>863</sup> Interviewee # 15, 18

<sup>864</sup> Interviewee # 2, 5, 22

<sup>865</sup> Interviewee # 22

<sup>866</sup> Interviewee # 26

<sup>867</sup> Code: Chair

<sup>868</sup> Interviewee # 19

<sup>869</sup> Interviewee #18, 19, 21, 24, 29

<sup>870</sup> Interviewee # 23, 27, 31

Drafting responsibility also meant paying attention to differences in individual styles.<sup>871</sup> Some arbitrators had preference of using their own templates while, still others preferred to ensure all the details were present without necessarily following a particular template.<sup>872</sup> Those acting as independent tribunal secretaries were therefore expected to have a ready-set of templates that maybe employed depending on the needs of the case.<sup>873</sup> Similarly, those arbitrators running a boutique arbitration firm or personal arbitration chambers had built a large collection of templates for different circumstances preferring to employ them or graft changes to them as per the needs of the case.<sup>874</sup>

There was a preference for some arbitrators to work with younger associates so as train them as per their own style and form.<sup>875</sup> The latter aspect was crucial so as have a synthesized draft that read together as a single piece as opposed to reflecting various drafters for each particular segment.<sup>876</sup> While, other arbitrators preferred having someone with some experience as a tribunal secretary so that the person so appointed understands the situation with the proceedings well and can prepare drafts on instruction.<sup>877</sup>

The tribunal secretaries who had worked with multiple arbitrators highlighted the importance of adjusting their work in view of the style and needs of the arbitrator.<sup>878</sup> The background and individual priorities of the arbitrator were the most crucial differentiating factor overwhelming any jurisdictional or geographical basis.<sup>879</sup> For tribunal secretaries, it meant adjusting their work as per the need of the arbitrators with respondents noting that it is seen as part of the service that they render.<sup>880</sup> For tribunal secretaries, it therefore meant to understand both the expectation of the scope of drafting responsibilities and adjusting to the style or template adopted in completing the task.<sup>881</sup> This involved understanding the individual preferences of

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<sup>871</sup> Interviewee # 3, 5, 19, 21, 26

<sup>872</sup> Interviewee # 3, 5, 24, 26, 27, 29

<sup>873</sup> Interviewee # 29

<sup>874</sup> Interviewee # 29

<sup>875</sup> Interviewee # 17, 27

<sup>876</sup> Interviewee # 20, 21, 24, 27, 28

<sup>877</sup> Interviewee # 5

<sup>878</sup> Code: Flexibility, Interviewee # 3, 5, 8, 18, 19, 20, 21, 24, 26, 27, 28, 30, 31

<sup>879</sup> Interviewee # 5, 18, 19, 20, 21, 24, 30

<sup>880</sup> Interviewee # 3, 5, 18, 20, 27, 29

<sup>881</sup> Interviewee # 3, 5, 21

the arbitrators in carrying out pre-hearing activities and therefore, preparing drafts of procedural orders accordingly.<sup>882</sup> These also included navigating their individual preferences, for instance, quickly acknowledging receipts of parties' communications and the preparing draft responses for responding to these communications immediately for the review of the arbitrator.<sup>883</sup> It also involved tailoring the style of drafting with some arbitrators indicating preference for concision while still others preferring meticulous recounting of every detail.<sup>884</sup>

All those who had acted as tribunal secretaries saw their work usually commencing from the stage of preparation of the Procedural Order number 1 or in case of ICC arbitration, Terms of Reference<sup>885</sup> onwards till the final award.<sup>886</sup> Most procedural orders are understood to be boilerplate lacking in contentiousness and thus, requiring minimal decision-making from the tribunal and therefore, seen as the most common form of drafting to be delegated.<sup>887</sup> These include preliminary contents like parties' contact details, parties' information, counsel information, arbitrator's information and ensuring that the format is correct.<sup>888</sup> It also includes preliminary drafting of the directions issued by the tribunal on parties' interlocutory applications.<sup>889</sup> These orders are usually boilerplate orders unless they involved a contentious question that required decision-making from the tribunal and thus, seen as ideal for being delegated to the tribunal secretaries.<sup>890</sup>

The drafting of procedural history of the proceeding is a key task of the tribunal secretary understood by both the arbitrators and tribunal secretaries alike.<sup>891</sup> This is because it is a step-by-step reconstruction of the events of the proceedings by referring the correspondence and emails.<sup>892</sup> Arbitrators understand it as a cumbersome time-consuming task that at the same time demanded high-degree of meticulousness and attention to detail and thus, the ideally suited for

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<sup>882</sup> Interviewee # 2

<sup>883</sup> Interviewee # 6, 26, 30

<sup>884</sup> Interviewee # 5, 15

<sup>885</sup> Albert Jan van den Berg, *supra* note 645. Pgs. 419-421 and Paulo Michele Patocchi and Robert Briner, *supra* note 685. Pgs. 283-285 for explanation of Procedural Order 1 and Terms of Reference.

<sup>886</sup> Code: Drafting, Interviewees # 2, 3, 5, 6, 8, 11, 12, 14, 15, 17, 18, 19, 20, 21, 24, 25, 26, 27, 30, 31, 33

<sup>887</sup> Interviewee # 3, 4, 5, 6, 9, 10, 11, 15, 18, 19

<sup>888</sup> Interviewee # 3, 6, 9, 18, 19

<sup>889</sup> Interviewee # 19, 26, 30, 31

<sup>890</sup> Interviewees # 4, 5, 6, 9, 10, 11, 15, 18, 19, 21, 27

<sup>891</sup> Code: Drafting

<sup>892</sup> Interviewee # 15

delegation to the tribunal secretaries.<sup>893</sup> The drafting of procedural history involves a chronological detailing of each procedural step, including, any application by the parties and corresponding order by the tribunal as well as any communication that had a bearing on the proceeding as a whole. An arbitrator noted with exasperation of having done it once and it consumed a large amount of time and therefore, now instructs the tribunal secretary, whenever she is the presiding arbitrator, to maintain the procedural history from the very commencement of the proceedings in order to avoid missing any detail or having to do it at the end.<sup>894</sup> Tribunal secretaries in turn have been unanimous with having drafted procedural history as a regular part of their drafting responsibility.<sup>895</sup>

The tone of drafting is expected to be neutral and not in the style of a counsel who would be expected to advocate in the interest of the party.<sup>896</sup> This mean that the language shouldn't be emotional, that is, not being advocacy for one party and should engage with all the arguments presented by the parties.<sup>897</sup> An arbitrator noted that this to be a key reason for having younger associates work as tribunal secretary because being just out of law school because they still retain a tendency for thinking like judges which in turn becomes an asset in preparation of drafts that require such a distanced approach.<sup>898</sup> Another arbitrator, with over three decades of experience, clarified that this was so because the final draft is geared towards the losing party so that they understand the reasons as to why they lost.<sup>899</sup>

All respondents that had worked as tribunal secretaries, with one exception, reported to have engaged in preparation of summarization of facts or factual background in the dispute.<sup>900</sup> The sole exception in turn acknowledged having witnessed tribunal secretaries prepare such summaries in her present role as an arbitrator finding such summaries to be valuable tool in assistance for drafting now that she acts as an arbitrator.<sup>901</sup> The drafting of the summary of

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<sup>893</sup> Interviewees # 3, 5, 6, 9, 11, 15, 19, 20, 24, 26, 27, 33

<sup>894</sup> Interviewee # 15

<sup>895</sup> Interviewees # 3, 5, 11, 18, 19, 20, 21, 26, 27, 29, 33

<sup>896</sup> Interviewee # 19, 26

<sup>897</sup> Interviewee # 19

<sup>898</sup> Interviewee # 15

<sup>899</sup> Interviewee # 22

<sup>900</sup> Interviewee # 2, 3, 5, 8, 11, 17, 18, 19, 20, 21, 24, 25, 26, 27, 29, 30, 33

<sup>901</sup> Interviewee # 9

facts was seen as obvious and integral part of the drafting responsibilities on par with the drafting of procedural orders and preparation of procedural history.<sup>902</sup>

The tribunal secretaries understood that the expectation of mastering of the file meant at the very least to be able to know the pleadings, witness statements and key exhibits of the case with all respondents, except one<sup>903</sup>, stating this expected knowledge to be absolute or at least of the same level as the arbitrators.<sup>904</sup> The respondent who disagreed with such maximalist approach to knowledge of the file however acknowledged that she was expected to know the pleadings and key exhibits, if not all the documents, then, at least in a manner to be able to quickly locate any document that maybe requested by the tribunal.<sup>905</sup> However, all agreed that preparation of summaries was integral to being tribunal secretary<sup>906</sup> with one respondent repeating it twice in the interview of being surprised as coming across an online post inquiring as to permissibility of preparation of summaries.<sup>907</sup> An arbitrator who drafted all her awards by herself whenever she was the chair to the tribunal or sole arbitrator acknowledged that such summaries assist in such drafting.<sup>908</sup> Arbitrators saw the delegation of preparation summaries as one of the first tasks given to the tribunal secretary after the hearings or conclusion of deliberations.<sup>909</sup> A senior arbitrator with over two decades of experience noted that she considered preparation of summaries as merely administrative task delegated to the tribunal secretaries.<sup>910</sup>

There was an acknowledgement that the preparation of summaries of fact or factual background may not be straightforward an exercise.<sup>911</sup> This is because it has two issues - first, presentation of facts that maybe disputed and second, the concern of shortening of the facts may lead to accentuation or diminishing of some facts.<sup>912</sup> The tribunal secretaries were conscious of both

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<sup>902</sup> Code: Drafting

<sup>903</sup> Interviewee # 20

<sup>904</sup> Code: Knowledge of the File

<sup>905</sup> Interviewee # 20

<sup>906</sup> Code: Drafting

<sup>907</sup> Interviewee # 20

<sup>908</sup> Interviewee # 9

<sup>909</sup> Interviewee # 4, 6, 10, 12, 13, 17, 22, 28, 31, 34

<sup>910</sup> Interviewee # 34

<sup>911</sup> Interviewee # 18, 19, 21, 27, 29, 34

<sup>912</sup> Interviewee # 18, 19, 21, 27, 29

these challenges, especially, of the first one, that such factual background does include facts that are disputed and usually, the disputed facts have legal consequences attached to them.<sup>913</sup> Arbitrators on their part were also aware of this and recognized that it meant that the summarization of facts had to be reviewed subsequent to their preparation against the record.<sup>914</sup>

There were three broad approaches taken by those that had acted as tribunal secretary when confronted with the disputed set of facts.<sup>915</sup> First approach was that of preparation of a section titled undisputed facts and thereafter, present the disputed facts under the section of parties' submissions.<sup>916</sup> The second approach was to prepare a single factual section leaving those paragraphs either highlighted or blank with the indication to the tribunal that it required their evaluation.<sup>917</sup> This was also done through choice of vocabulary for instance, prefacing certain factual descriptions as originating from the record while prefacing others as being argued by the parties.<sup>918</sup> The third approach was to present the facts within the summaries of parties' positions.<sup>919</sup> The choice of approach depended on the preference of the arbitrator with the first approach being acknowledged as the most difficult one because it demanded significant engagement with the record.<sup>920</sup> The respondents also developed series of methods, either in form of comment-bubbles, highlights, footnotes or blanks to indicate sentences or paragraphs that required factual determination by the tribunal.<sup>921</sup> These markings would usually be accompanied by references to the record, like the pleadings, witness statements or exhibits to indicate the source of the contention.<sup>922</sup>

With regard to the concern as to possibility of accentuation or diminishing of certain facts, the respondents who had acted as tribunal secretary responded that attendance at deliberations as well as being instructed before the drafting assisted in such preparation.<sup>923</sup> For instance, one

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<sup>913</sup> Interviewee # 5, 8, 11, 18, 19, 20, 21, 24, 26, 27, 28, 29

<sup>914</sup> Interviewee # 4, 12, 15, 22, 27, 34

<sup>915</sup> Interviewee # 10, 17, 18, 19, 20, 21, 26, 27

<sup>916</sup> Interviewee # 18, 21, 24, 26, 28, 29, 33

<sup>917</sup> Interviewee # 10, 19, 21

<sup>918</sup> Interviewee # 18

<sup>919</sup> Interviewee # 20, 24

<sup>920</sup> Interviewee # 27, 29

<sup>921</sup> Interviewee # 10, 18, 19, 20, 21

<sup>922</sup> Interviewee # 5, 10, 18, 19, 20, 21, 24, 27

<sup>923</sup> Interviewee # 5, 29

respondent referred to receiving comments on her draft of summaries from the tribunal indicating changes and that the approach for drafting meant to be open-minded to both the parties.<sup>924</sup> The respondent arbitrators acknowledged their role in reviewing the record to ensure that the summaries so prepared reflected the record accurately.<sup>925</sup>

The preparation of summaries of parties' positions and list of issues to be decided was also understood to be integral to the work of tribunal secretaries.<sup>926</sup> The summary of parties' positions includes the arguments made by the parties while the list of issues being more broad in scope covering all the factual and legal questions that had arisen during the arbitration. Both these documents are regularly prepared by the tribunal secretaries and tasked by the arbitrators.<sup>927</sup> Such a document would take the shape of bench memo when prepared before the hearing.<sup>928</sup> The presiding arbitrator may utilize it as a pre-deliberation outline to assist in conduct of the deliberations.<sup>929</sup> It may also become part of the award so that the tribunal secretary is able to employ the notes made during the deliberations.<sup>930</sup>

Nine respondents who acted as tribunal secretaries also responded to have worked on dispositive or reasoning component of substantive procedural order or the final award.<sup>931</sup> A substantive procedural order being an order that determined a key procedural question presented during the arbitration that required decision-making from the arbitral tribunal.<sup>932</sup> Though, some respondents who acted as tribunal secretaries noted to not have been delegated the drafting of reasoning or dispositive part of the award.<sup>933</sup>

The task for drafting of reasoning of the award was usually given after the deliberations, where the tribunal secretary would be in attendance expected to take notes of the deliberations and then, following specific directions to prepare a first draft for the consideration of the presiding

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<sup>924</sup> Interviewee # 19

<sup>925</sup> Interviewee # 4, 6, 12, 34

<sup>926</sup> Code: Drafting

<sup>927</sup> Interviewee # 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 31, 33

<sup>928</sup> Interviewee # 3, 10, 13, 25

<sup>929</sup> Interviewee # 12, 15

<sup>930</sup> Interviewee # 5, 12, 27, 29

<sup>931</sup> Interviewee # 2, 5, 17, 18, 19, 21, 24, 26, 29

<sup>932</sup> For instance, Alan Redfern, *supra* note 845.

<sup>933</sup> Interviewee # 3, 9, 11, 25, 27, 28

arbitrator.<sup>934</sup> An arbitrator cited this as a key benefit of tribunal secretary being in attendance during the deliberation so that the notes of analysis done by the tribunal are kept and then used to prepare preliminary draft of the reasoning section of the award.<sup>935</sup> Another respondent who had not worked on the dispositive parts of the final award but had experience of preparation of drafts of substantive procedural orders acknowledged at the same time the control exercised by the arbitral tribunal.<sup>936</sup> The drafting of reasoning or dispositive parts of the award was considered to be result of direct and clear direction as to what to include alongside clearly highlighting the decisions that were covered in the draft.<sup>937</sup> With exception of two instances narrated by two interviewees, neither those who acted as tribunal secretary nor those that acted as arbitrator, stated that the tribunal secretaries were given dispositive or reasoning section of the award without instructions.<sup>938</sup> In both the exceptional instances, there was significant revision, including entirely reversing the reasoning done by the tribunal secretary.<sup>939</sup> Additionally, two interviewees noted of being aware of instances not concerning themselves but others where significant parts of the award were being delegated to the tribunal secretaries.<sup>940</sup> One of the interviewees noted that there was hypocrisy where many leading arbitrators were delegating drafting of substantive parts without acknowledging the same.<sup>941</sup>

The foregoing paragraphs reveal an ascending degree of role of direction, supervision and revision depending on the task with the standard procedural orders and procedural history requiring the least supervision, followed by the summaries of facts, parties' position and finally, the reasoning having the greatest direction, supervision and revision done by the arbitral tribunal. This is to be expected because as a senior arbitrator with over two decades of experience argued that the awards cannot be overturned on the ground of summaries that form part of it.<sup>942</sup> While, one respondent acknowledged that her style of drafting summaries was discernable from the drafting style of the arbitrator, she also acknowledged that non-dispositive

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<sup>934</sup> Interviewee # 29

<sup>935</sup> Interviewee # 15

<sup>936</sup> Interviewee # 18

<sup>937</sup> Interviewee # 2, 5, 10, 13, 15, 17, 22, 26, 29, 31

<sup>938</sup> Code: Drafting

<sup>939</sup> Interviewee # 24, 31

<sup>940</sup> Interviewee # 12, 14

<sup>941</sup> Interviewee # 12

<sup>942</sup> Interviewee # 10

parts of the awards were different in their nature from that of the reasoning and award.<sup>943</sup> The interviewees revealed a similar conceptual division along the lines of these three broad categories in their discussion on their drafting responsibilities discerning the boilerplate procedural orders from that of the factual or non-substantive part of the final award from that of the substantive procedural order or the substantive part of the final award.<sup>944</sup>

Respondents were also unanimous in their experience of giving and receiving instructions, constant supervision and subsequent review of their work.<sup>945</sup> There were variations in how detailed such instructions were supposed to be, with one respondent noting that a good secretary is one that doesn't require too much instruction while another making a tongue in cheek remark that there were cases where the instruction given could have been better.<sup>946</sup> It was noted that the need for detailed instructions for tasks diminished with their experience of acting as tribunal secretaries.<sup>947</sup> This level of experience was noted by arbitrators with another senior arbitrator and counsel noted that her experience as a counsel was that the skill of tribunal secretary was revealed quite early in stage of arbitral proceedings on account of how smoothly the arbitration proceeded.<sup>948</sup>

Nevertheless, tribunal secretaries and arbitrators alike emphasized the importance of direction in order to ensure that the task was carried out as expected.<sup>949</sup> It was pointed out that the tribunal secretary was justified on the grounds of costs savings and therefore, taking of instructions clearly was necessary as early as possible.<sup>950</sup> Tribunal secretaries see directions as paramount so as to both deliver what was expected of them and not to waste time doing what would eventually be rejected or seen as unnecessary.<sup>951</sup> Arbitrators in turn saw this process more as a discussion to be able to cull out necessary tasks to be completed at each stage.<sup>952</sup> These discussions visualized tribunal secretaries as sounding board or brainstorming and in turn, were

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<sup>943</sup> Interviewee # 5

<sup>944</sup> Code: Drafting, Interviewees # 2, 3, 6, 9, 10, 18, 19

<sup>945</sup> Code: Direction, Supervision & Revision

<sup>946</sup> Interviewee # 10, 19

<sup>947</sup> Interviewee # 5, 18, 19

<sup>948</sup> Interviewee # 6, 15

<sup>949</sup> Code: Direction, Supervision & Revision

<sup>950</sup> Interviewee # 2, 5, 6, 27

<sup>951</sup> Interviewee # 3, 8, 20, 27

<sup>952</sup> Interviewee # 6, 13, 15, 17

understood by tribunal secretaries as a conversation to ensure all necessary issues that that stage of arbitration required were addressed before delegation of the task.<sup>953</sup> One tribunal secretary with experience of working with multiple arbitrators emphasized that tribunal secretary should not be intimidated by the stature of the arbitrator while taking instructions in order to ensure that the work delivered conforms to the needs of the arbitrator.<sup>954</sup> In practice, all respondents who acted as tribunal secretaries noted the importance of taking clear directions so that their output conforms to what the arbitrator needed.<sup>955</sup> A senior arbitrator with over two decades of experience put it pithily that good tribunal secretary doesn't do unnecessary things.<sup>956</sup> An arbitrator with background as tribunal secretary re-affirmed this idea on account of cost justification that their activities being billed meant that the tribunal secretaries cannot do tasks beyond what was needed.<sup>957</sup>

The tribunal secretaries also responded that they could solicit further clarifications as they proceeded with their work.<sup>958</sup> This included any new issue that arose while working on that task for which the earlier set of instructions were not sufficient.<sup>959</sup> They stated that this was possible because the arbitrators were comfortable working with them and rapport and trust was part of the relationship.<sup>960</sup> This meant in practice that the tribunal secretary was able to go back to the arbitrator for further discussion and clarify any questions.<sup>961</sup> Arbitrators in turn acknowledged that the process of supervision was an ongoing one involving continuous discussion between them and the tribunal secretary for completion of a particular task and that this depended on the complexity of the task.<sup>962</sup>

All respondents, both those who had acted as tribunal secretary and those that had experience of tribunal secretary while being an arbitrator, responded that review of the tasks, especially

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<sup>953</sup> Interviewee # 6, 15, 29

<sup>954</sup> Interviewee # 24

<sup>955</sup> Code: Direction, Supervision & Revision

<sup>956</sup> Interviewee # 10

<sup>957</sup> Interviewee # 20

<sup>958</sup> Interviewee # 3, 11, 17, 18, 19, 28

<sup>959</sup> Interviewee # 11

<sup>960</sup> Interviewee # 11, 21

<sup>961</sup> Interviewee # 11

<sup>962</sup> Interviewee # 4, 6, 15, 22

the drafting tasks, always took place.<sup>963</sup> One respondent humorously responded that she was never fortunate where her draft was accepted without change.<sup>964</sup> A senior arbitrator with over two decades of experience found adoption of a draft by the tribunal unproblematic as long as it corresponded to what the arbitrators had decided.<sup>965</sup> The stage of revision meant new additions to the draft as well as re-wording of the draft.<sup>966</sup> It also meant addition of key argument or exhibits by the arbitrators that the tribunal secretary was then expected to incorporate into the draft.<sup>967</sup>

However, one experienced arbitrator with background as tribunal secretary noted this aspect of deep review as a key reason for avoiding delegation of drafting to tribunal secretaries now she herself was an arbitrator.<sup>968</sup> She reasoned that this involved double-work where she had to cross-check all that was submitted but however, acknowledged that she may appoint tribunal secretary for drafting responsibilities when she may face larger arbitration cases.<sup>969</sup> The tribunal secretaries that were at earlier stages of being arbitrator reflected this unwillingness to delegate to tribunal secretaries on account of the double work that revision entailed.<sup>970</sup>

A senior arbitrator with over two decades of experience emphasized the importance of this stage of review being where the draft submitted by the tribunal secretary really becomes the arbitrator's draft because of the revisions that are made.<sup>971</sup> The knowledge of file by the arbitrators was understood as crucial to be able to make revisions so that the draft reflects their own decision-making.<sup>972</sup> This was especially the case when the drafting involved a dispositive or reasoning part of the award where the tribunal secretary's work was altered to reflect the views of the tribunal more precisely.<sup>973</sup>

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<sup>963</sup> Interviewee # 4, 5, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 24, 26, 27, 29

<sup>964</sup> Interviewee # 24

<sup>965</sup> Interviewee # 10

<sup>966</sup> Interviewee # 19

<sup>967</sup> Interviewee # 29

<sup>968</sup> Interviewee # 27

<sup>969</sup> Interviewee # 27

<sup>970</sup> Code: Transition to Arbitrator, Interviewee # 12, 25, 27

<sup>971</sup> Interviewee # 4

<sup>972</sup> Interviewee # 10, 15, 22

<sup>973</sup> Interviewee # 29

In a nutshell, the dynamics between the tribunal secretary and the arbitrator involves the commencement of tasks with direction that involves clear instructions of what is to be drafted. This is followed by a period where the tribunal secretary carries out the drafting and is able to discuss or solicit any clarifications or answers to questions that may arise as part of completing the draft. Finally, the arbitrator or the tribunal incorporated any new arguments or issues as well as to redrafted the wording of the award during their review of the draft submitted by the tribunal secretary. This also meant verification against the record to ensure that neither any point is overlooked nor there are errors in citing of record besides, making additions to the draft that were not instructed to the tribunal secretaries.

### 6.3.3. SUMMING-UP: DELEGATION OF DRAFTING

The scope of drafting responsibilities has remained the center around which the anecdotes and consequently, the role of the tribunal secretary is discussed.<sup>974</sup> The concern being that the secretaries may usurp the decision-making role of the arbitrator or the tribunal. The empirical study finds that in practice, this is not the case with both the arbitrators who supervise them and the tribunal secretaries themselves demonstrating the critical role of direction, supervision and revision for each task that is delegated to them. Additionally, there is a clear recognition of principle of *intuitu personae* by the tribunal secretaries themselves who understand the role of greater instruction and more rigorous verification depending on the tasks that may have a greater influence or may directly be connected with the decision-making.<sup>975</sup>

This empirical study found no instance where the reasoning or the merits of either a substantive procedural order or the final award being drafted by a tribunal secretary without detailed direction or subsequent review. Though, tribunal secretaries understood that linguistic analysis may reveal presence of different drafters and in one particular instance, the tribunal secretary acknowledged the difference in language and style between herself and the arbitrator, yet, the study did not find the aggrandizing role of making decisions and taking judgment calls by the tribunal secretaries.<sup>976</sup> This was also true when the tribunal secretaries acted in an undisclosed manner.<sup>977</sup>

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<sup>974</sup> For instance, Zachary Douglas, *supra* note 14.; Constantine Partasides, *supra* note 172.

<sup>975</sup> Code: Intuitu Personae

<sup>976</sup> Interviewee # 5, 28

<sup>977</sup> Interviewee # 21, 25

Instead, the empirical study shows awareness on the part of tribunal secretaries of how each task relates with the decision-making and have developed methods and techniques to carry out their responsibilities so as to not overstep their role while providing the final output that is in conformity with the needs of the arbitrator or the tribunal.

Put together, they reveal the practices of arbitrators and tribunal secretaries in how in actuality the tribunal secretaries carry out the responsibility of drafting. These practices reflect the habitual patterns of carrying out different tasks.<sup>978</sup> What the empirical study shows that both the tribunal secretaries and the arbitrators are mindful of the principle of *intuitu personae* and consequently, ensure that there is adequate direction, supervision and revision of the tasks delegated to the tribunal secretaries.

It is therefore a key conclusion of this study that the practice is of good arbitrators and diligent secretaries for delegation of drafting. That is, in terms of articulating the value of *intuitu personae* and practicing direction, supervision and revision, there is a strong congruence on what is discussed in the literature and what is practiced in actuality. The respondents were from different jurisdictions, even though European jurisdictions predominate, that these values and practices have diffused across the leading jurisdictions and are being practiced as such.<sup>979</sup> Four interviewees noted that there was no difference in terms of delegated tasks and method of carrying them out on account of different jurisdictional rules.<sup>980</sup>

#### **6.4. PRACTICE OF BEING A TRIBUNAL SECRETARY: DELIBERATIONS**

This section presents the empirical findings as to the role of the tribunal secretary in relation to deliberations. In this regard, it looks at their role before the deliberation, during the deliberation and after its conclusion. A key component of this inquiry is their role, especially the question of participation, during the deliberations.

Tommaso Soave's hypothetical tribunal secretary for an ideal ISDS arbitration, Carlos made a presentation to the arbitrators during the deliberations.<sup>981</sup> This act of the Tommaso's fictional Carlos became a point of inquiry for the purpose of understanding the degree of participation by the tribunal secretaries during the deliberations. This is not for validation or invalidation of

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<sup>978</sup> Kaczmarczyk and Lam, *supra* note 243.; Jeffrey Dunoff and Mark A. Pollack, *supra* note 270.

<sup>979</sup> Code: Different Rules & Cases

<sup>980</sup> Interviewee # 18, 27, 28, 33

<sup>981</sup> TOMMASO SOAVE, *supra* note 491. Pgs 266-267

the fictional Carlos but geared towards learning the role the tribunal secretary during the deliberations with the question of presentation of issues becoming a route for both questioning and learning the degree of participation during the deliberations.

The second inquiry put to the respondents was on the possibility of intervention and its nature in case the tribunal secretary, either as part of their experience or merely as a hypothetical situation, noticed that the tribunal was deliberating on an erroneous understanding of fact. This inquiry assisted in understanding the scope of their intervention.

The section opens with brief description as to what is deliberation and its various aspects. Being confidential in nature, this section relies on the experience shared by the arbitrators in their writings to briefly present the stage and dynamics of deliberations.

It thereafter presents the empirical findings of this study before concluding on the role and the scope of intervention, if any, by the tribunal secretaries during deliberations.

#### 6.4.1. BLACK BOX OF DELIBERATIONS

The stage of deliberations has been labelled a black box on account of the secrecy of deliberations and absence of any rules in conducting it.<sup>982</sup> This means in effect they are carried out in private to the exclusion of third party with the tribunal secretary being admitted only if the tribunal agrees so.<sup>983</sup> Usually, the arbitrators conduct the deliberations in person meeting physically at a venue but it may also be carried out through telephone or through online means.<sup>984</sup>

The presiding arbitrator is expected to take the initiative for the conduct of the deliberations and is expected to circulate list of issues for examination by the co-arbitrators.<sup>985</sup> This may also involve consultation by the presiding arbitrator with other arbitrators for an exchange of views immediately after the hearing.<sup>986</sup> This list of issues is expected to be a broad outline of decision tree to allow for an exchange of views by the co-arbitrators as well as to recall the parties'

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<sup>982</sup> Julien Lew, *Decision-Making and Deliberations: Steps and Issues*, in INSIDE THE BLACK BOX: HOW ARBITRAL TRIBUNALS OPERATE AND REACH THEIR DECISIONS 13 (Bernhard Berger & Michael E. Schneider eds., 2014).

<sup>983</sup> Piero Bernardini, *Organisation of Deliberations*, in INSIDE THE BLACK BOX: HOW ARBITRAL TRIBUNALS OPERATE AND REACH THEIR DECISIONS 15 (Bernhard Berger & Michael E. Schneider eds., 2014).

<sup>984</sup> *Id.*

<sup>985</sup> *Id.*

<sup>986</sup> Paulo Michele Patocchi and Robert Briner, *supra* note 685. Pg. 301

position on an issue-by-issue basis.<sup>987</sup> This decision tree, so to say, is expected to follow a logical sequence starting with issues of preliminary nature followed by more substantive issues so that the culmination of deliberations leads to a final decision on all issues.<sup>988</sup> It also involves taking minutes or record of the conclusion reached so that the award is drafted on the basis of the conclusions reached during the deliberations.<sup>989</sup> Tribunal secretaries have been recommended as being advantageous in assisting the tribunal during the deliberations through assistance with the record.<sup>990</sup> This is on account of expectation of mastering the file on the part of the tribunal secretary, for instance, in answering questions about the exhibits.<sup>991</sup>

The social aspect of deliberations has also been emphasized with the expectation that the arbitrators getting to know each other so as to ensure that there is collegiality and meaningful dialogue during the deliberations.<sup>992</sup> Additionally, the possibility of thinking out loud informally so that the arbitrators are comfortable sharing their preliminary assessments has been emphasized as crucial to carrying out deliberations.<sup>993</sup> This is important so that the arbitrators are willing to persuade as well as be persuaded while carrying out the analysis of the arbitration.<sup>994</sup>

The purpose of the deliberations being to analyze the issues presented by the parties in order to attempt to reach a unanimous decision.<sup>995</sup> This involves preparation by the arbitrators on the record of the arbitration in order to persuade the other arbitrators to one's position.<sup>996</sup> However, the party-appointed arbitrator is expected to ensure that the case for the party that appointed him or her is adequately represented during the deliberations.<sup>997</sup> It may lead to analytical

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<sup>987</sup> *Id.*

<sup>988</sup> Ugo Draetta, *The Dynamics of Deliberation Meetings and Dissenting Opinions*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 889 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014).

<sup>989</sup> *Id.*

<sup>990</sup> L. Yves Fortier, *supra* note 320.

<sup>991</sup> Pierre Tercier, *supra* note 9. Pg. 547

<sup>992</sup> L. Yves Fortier, *supra* note 320.

<sup>993</sup> *Id.*; Piero Bernardini, *supra* note 983.

<sup>994</sup> L. Yves Fortier, *supra* note 320.

<sup>995</sup> *Id.*

<sup>996</sup> Ugo Draetta, *supra* note 988.

<sup>997</sup> Andreas F. Lowenfeld, *The Party-Appointed Arbitrator: Further Reflections*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 469 (Lawrence Walker Newman & Richard D. Hill eds., Third ed ed. 2014).

discussion with arbitrators attempting to persuade each other with eventually, willing to modify their initial position.<sup>998</sup> This is expected of the presiding arbitrator as well as the co-arbitrators.<sup>999</sup> If the tribunal secretary is present, he is expected to take notes of what was said and decided during the deliberations.<sup>1000</sup>

However, the deliberations may also lead to engaging in concessions with arbitrators attempting resolve the issues through withdrawal of disagreement on one issue in return for similar concession by others on different issue.<sup>1001</sup> This has been called horse-trading by some where the presiding arbitrator instead of proceeding on analysis pursues a goal of reaching a common settlement with co-arbitrators.<sup>1002</sup>

#### 6.4.2. DISCUSSION FROM THE EMPIRICAL STUDY

All respondents agreed, when they were formally appointed, to have been in attendance during the deliberations.<sup>1003</sup> The exceptions being when the tribunal secretary acted as undisclosed secretary or informal secretary assisting the co-arbitrators or when no hearing took place.<sup>1004</sup> There were only two respondents who did not attend the deliberations even when formally pointed with one respondent having a long career as tribunal secretary and thus, being involved in many arbitrations while the other acting as tribunal secretary only few times early in her career.<sup>1005</sup> One arbitrator respondent, however, objected to presence of the tribunal secretary on account of his concern of influence on the presiding arbitrator.<sup>1006</sup> Another arbitrator, with over two decades of experience, reported to have objected to the presence of assistant of the co-arbitrator who had no formal appointment.<sup>1007</sup> The tribunal secretaries overwhelmingly responded to having been in attendance during the deliberations as well as being privy to the

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<sup>998</sup> L. Yves Fortier, *supra* note 320.

<sup>999</sup> Ugo Draetta, *supra* note 988.

<sup>1000</sup> Jean Pierre-Fierens, *supra* note 17.

<sup>1001</sup> Andreas F. Lowenfeld, *supra* note 997.

<sup>1002</sup> Ugo Draetta, *supra* note 988.

<sup>1003</sup> Code: Deliberations, Interviewee #3, 5, 6, 9, 10, 11, 15, 17, 18, 19, 20, 21, 24, 26, 27, 28, 29; For the discussion on informal and hidden secretaries refer, Section 6.5.; For discussion on formal appointment as tribunal secretary, refer Chapter 7.

<sup>1004</sup> Interviewee # 24, 25, 26

<sup>1005</sup> Interviewee # 12, 27

<sup>1006</sup> Interviewee # 9

<sup>1007</sup> Interviewee # 15

correspondence over emails that mirrored deliberations of issues to be decided.<sup>1008</sup> The respondents understood the attendance of the tribunal secretaries as obvious and integral to their duties.<sup>1009</sup> Not permitting the tribunal secretary to attend the deliberations, especially in when the tribunal secretary was appointed was seen as a too rigid an approach towards tribunal secretaries.<sup>1010</sup>

Assistance in preparation of pre-deliberation documents was a common task delegated to the tribunal secretary by the presiding arbitrator.<sup>1011</sup> This involved creation of a chart to list the main issues in the arbitration including, identification of relevant evidence and an outline that may be used for the eventual drafting of the award.<sup>1012</sup> This outline would be summary of parties' position, that is, what they have argued alongside legal and factual issues raised by them.<sup>1013</sup> The presiding arbitrator before the commencement of the deliberations would circulate these summaries so as to enable the co-arbitrators to come prepared for the deliberations.<sup>1014</sup>

The respondents who had acted as tribunal secretaries were unanimous in that they were silent throughout the deliberations.<sup>1015</sup> With one respondent humorously stating that she was fortunate to not be asked like junior associates in law firm to share her views before three renowned arbitration experts.<sup>1016</sup> An arbitrator who had been tribunal secretary in her earlier years recounted being asked to stay silent when she volunteered her views during the deliberations in her first appointment as tribunal secretary and since then to have never done so.<sup>1017</sup> Another arbitrator, who too had been tribunal secretary in her earlier years, stated that she would be upset if the tribunal secretary took a pro-active role.<sup>1018</sup> The respondents who

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<sup>1008</sup> Interviewee # 3, 5, 6, 9, 10, 11, 15, 17, 18, 19, 20, 21, 24, 26, 27, 28, 29

<sup>1009</sup> Code: Deliberations

<sup>1010</sup> Interviewee # 6, 17, 22

<sup>1011</sup> Interviewee # 4, 15, 18, 26, 27, 29

<sup>1012</sup> Interviewee # 4, 17, 26

<sup>1013</sup> Interviewee # 15, 18

<sup>1014</sup> Interviewee # 15

<sup>1015</sup> Interviewee # 3, 5, 9, 11, 18, 19, 20, 21, 24, 26, 27, 28, 29, 33

<sup>1016</sup> Interviewee # 29

<sup>1017</sup> Interviewee # 11

<sup>1018</sup> Interviewee # 9

acted as tribunal secretaries used the phrases, ‘biting the tongue’ and ‘stay silent’ in response to questions about their participation during the deliberations.<sup>1019</sup>

Tribunal secretaries saw their role during the deliberations as involving two broad set of responsibilities, namely, to be ready with the production of documents or details from the record when requested by the arbitrators and second, to keep track of decisions and maintain the notes of the deliberations.<sup>1020</sup>

The first involved responding to the questions of the arbitrators as they arose during the deliberations regarding citation of legal authorities, specific documents or locating any particular argument of the parties from the record.<sup>1021</sup> This meant that the tribunal secretaries had to listen to the proceedings as they carried on and be prepared to locate necessary material from the record.<sup>1022</sup>

The second involved maintaining minutes of the deliberations so that the discussion of the tribunal is recorded and then, be used by the presiding arbitrator for preparation of the final award.<sup>1023</sup> One senior arbitrator noted that when the deliberations are analytical where the co-arbitrators are prepared and give inputs in order to resolve the issues then, the notes so produced are quite effective and can be used by the tribunal secretary for the preparation of the preliminary draft of the award on the basis of the deliberations.<sup>1024</sup> Another senior arbitrator echoed this as the advantage of tribunal secretary of having to attend the deliberations was to get the first draft of the award prepared by the tribunal secretary, including, use of the notes by the arbitrator for her own drafting.<sup>1025</sup> Another senior arbitrator pointed out that the notes prepared by the tribunal secretary would be relied by the arbitrators both for the purpose of drafting as well as to locate issues that required further discussion among the arbitrators.<sup>1026</sup> Similarly, a tribunal secretary who had experience of preparing drafts on the reasoning section of the award stated that the notes of deliberations were akin to a tree that had been laid out by

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<sup>1019</sup> Interviewee # 11, 18, 19, 20, 21, 24, 26, 27, 28, 29, 33

<sup>1020</sup> Code: Deliberations, Interviewee # 3, 5, 9, 11, 15, 18, 19, 20, 21, 22, 24, 26, 27, 29, 33

<sup>1021</sup> Interviewee # 18

<sup>1022</sup> Interviewee # 14, 19, 27, 34

<sup>1023</sup> Interviewee # 9, 15, 17, 20, 22, 29, 34

<sup>1024</sup> Interviewee # 15

<sup>1025</sup> Interviewee # 22

<sup>1026</sup> Interviewee # 34

the tribunal with only writing left for the tribunal secretary.<sup>1027</sup> Another tribunal secretary noted that the knowledge of deliberations as well as specific instructions were useful in preparation of the first draft of the award.<sup>1028</sup>

However, arbitrators acknowledged that if the deliberations were more on the lines of compromise where the arbitrators decided the issues on the basis of give and take as opposed to analytical reasons, then, in those cases, the drafting of the reasoning could not be delegated to the tribunal secretary because the minutes would be of minimal assistance.<sup>1029</sup>

All the respondents who acted as tribunal secretary reported to have never made any presentation laying out the issues to be decided to the tribunal during the deliberations.<sup>1030</sup> The description of Carlos may have been an isolated case or at least this empirical study did not find any respondent who had acted as tribunal secretary to have made any presentation of the issues either at the outset or during the deliberations.<sup>1031</sup> One respondent who had acted as tribunal secretary reasoned that such would not be necessary because the tribunal usually deliberates after the hearings and therefore, there is an atleast minimum base of understanding of the arbitration among the arbitrators.<sup>1032</sup>

Finally, to assess the scope of intervention by the tribunal secretaries, a question exploring experience or preference was put to the respondents in case of they witnessed that the discussion among the arbitrators proceeded on an error of fact. The question would be usually on the line of their experience if they had noticed that the arbitrators were having a discussion on an error purely of fact or if they did not have the experience then, how would they react if they witnessed it. The respondents were clear that they would not intervene if it was an issue of substance or requiring decision from the arbitrators.<sup>1033</sup>

Of all the respondents who responded to have experienced this, all stated that they had intervened in such a circumstance.<sup>1034</sup> They reasoned it on the ground that they saw it as their

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<sup>1027</sup> Interviewee # 29

<sup>1028</sup> Interviewee # 26

<sup>1029</sup> Interviewee # 15, 22

<sup>1030</sup> Interviewee # 11, 18, 19, 20, 28, 29

<sup>1031</sup> TOMMASO SOAVE, *supra* note 491. Pgs 266-267

<sup>1032</sup> Interviewee # 11

<sup>1033</sup> Interviewee # 14, 18, 19, 27, 28

<sup>1034</sup> Interviewee # 10, 14, 17, 18, 19, 20, 21, 22, 24, 26, 27, 28, 21, 33

responsibility on account of expected mastery of the file as well as justifying their role as assisting the tribunal.<sup>1035</sup> As one interviewee, an arbitrator with background as tribunal secretary, put it that it was not in interest of the tribunal to take a position contrary to the record.<sup>1036</sup> However, they also stated that they would double-check as a preliminary to such intervention.<sup>1037</sup> An arbitrator who had been tribunal secretary reported that in her experience she had more often found that when double-checking the record on a point of fact, she found that she was under the misapprehension and that the tribunal were correct in their understanding of the fact.<sup>1038</sup> There was an emphasis that that they would do so only in case it was an error of fact.<sup>1039</sup> It was also emphasized that they would locate the supporting document so that the tribunal can review what they were saying as opposed to merely speaking out loud.<sup>1040</sup> It was pointed out that they would either politely break-in during the deliberations<sup>1041</sup> or, pass a post-it note<sup>1042</sup>, or send an email<sup>1043</sup> or, if the tribunal secretary shared a common language with the presiding arbitrator then, speak in that language<sup>1044</sup>.

One arbitrator stated that such intervention by tribunal secretary would be inappropriate and the tribunal secretary must communicate this subtly to the presiding arbitrator who then would decide whether to put it to the tribunal.<sup>1045</sup> Another arbitrator, who had been tribunal secretary, echoed that that is how she would navigate it.<sup>1046</sup> However, other arbitrators, who too had been a tribunal secretary, responded that it was perfectly normal to do so as long as it was matter of fact.<sup>1047</sup>

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<sup>1035</sup> Interviewee # 10, 19, 29

<sup>1036</sup> Interviewee # 17

<sup>1037</sup> Interviewee # 17, 19

<sup>1038</sup> Interviewee # 17

<sup>1039</sup> Interviewee # 14, 18, 19, 27, 28

<sup>1040</sup> Interviewee # 17, 19

<sup>1041</sup> Interviewee # 10, 17, 18, 19, 27

<sup>1042</sup> Interviewee # 14

<sup>1043</sup> Interviewee # 14, 26

<sup>1044</sup> Interviewee # 17

<sup>1045</sup> Interviewee # 9

<sup>1046</sup> Interviewee # 17

<sup>1047</sup> Interviewee # 10, 17, 19, 31

The arbitrators saw the possibility of such intervention favorably when such was an error of fact or case of missing an important document pointed out by the tribunal secretary.<sup>1048</sup> One senior arbitrator with over three decades of experience gave an example of a situation where the tribunal secretary reminded the tribunal during its discussion on quantum of damages of a claim of interest made by one of the parties.<sup>1049</sup> Another senior arbitrator with over three decades of experience also cited with approval an experience of working with a tribunal secretary who provided similar assistance.<sup>1050</sup>

Similarly, for those who had not experienced this and were asked to respond to such a hypothetical, all respondents, except one, stated that they would intervene provided that such an error was on the basis of fact.<sup>1051</sup> The only exception stated that she appreciates both sides of argument and that since she has not faced it yet, she had not really taken any stand.<sup>1052</sup>

#### 6.4.3. SUMMING UP

In a nutshell, a picture of tribunal secretaries present during deliberations emerges that of a clearly restricted role. The tribunal secretaries understand that their role during deliberations is passive and more often than not, is a silent one.<sup>1053</sup> As one arbitrator, who had been tribunal secretary put it, that they are not there as a fourth arbitrator.<sup>1054</sup> And the tribunal secretaries are extremely aware of the limits of their role to act as keepers of record. This knowledge of record is for assistance to the tribunal as per their requirements. This is revealed in that they would only speak up or intervene only on points of fact that would assist in furthering the deliberations or if the arbitrators missed some issue that was for their consideration.<sup>1055</sup>

The arbitrators too in turn were very alert to the role of the tribunal secretaries and saw any pro-activity negatively.<sup>1056</sup> They understood them as present to assist them with the record in locating documents, precedents or any specific pleading.<sup>1057</sup> Additionally, they saw their

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<sup>1048</sup> Interviewee # 6, 10, 22, 31

<sup>1049</sup> Interviewee # 22

<sup>1050</sup> Interviewee # 6

<sup>1051</sup> Interviewee # 11, 29

<sup>1052</sup> Interviewee # 11

<sup>1053</sup> Code: Deliberations

<sup>1054</sup> Interviewee # 21

<sup>1055</sup> Code: Deliberations, Interviewee # 6, 10, 14, 17, 18, 19, 22, 26, 27, 28, 31, 33

<sup>1056</sup> Interviewee # 9, 21, 27

<sup>1057</sup> Interviewee # 6, 19, 22, 31, 34

presence so to maintain the minutes of their deliberations for later assistance during the drafting of the final award.<sup>1058</sup>

In effect, the practice of being a tribunal secretary involves attendance during the deliberations. However, the role is passive not going beyond taking notes of the deliberations. Even when the secretary intervenes, it is expected to be done politely and limited to an issue of fact (along with the supporting document) or an obvious issue for the consideration of the tribunal that may have been missed. The empirical study found no instance, either from the arbitrators or the tribunal secretaries, of role that aggrandized decision-making through proactive participation during the deliberations. This in turn reveals the importance of the principle of *intuitu personae* as a practiced value held by both the arbitrators and the tribunal secretaries. They understand that a proactive role, especially, involving substance of the dispute would violate this principle and hence, such proactivity is neither expected by the arbitrators nor done by the tribunal secretaries. This is consistent across the board, including, different geographies where the interviewees were based or the institutional rules that they acted under.

## **6.5. PRACTICE OF BEING A TRIBUNAL SECRETARY: INFORMAL AND UNDISCLOSED SECRETARIES**

This section discusses the empirical findings with respect to informal and hidden secretaries. As a preface to the empirical findings, the section begins with introduction to the concerns expressed by the practitioners with regard to the practice of tribunal secretaries that lack formal appointment.<sup>1059</sup>

In order to discuss the empirical findings fully, the distinction between informal and hidden secretaries is introduced. This distinction allows to better capture the variety of practices that exist within the arbitral community.

Thereafter, the empirical findings on the scope of responsibilities, their similarities and divergences from the formal appointed tribunal secretaries are presented.

One key limitation of this thesis<sup>1060</sup> is its inability to comment upon the prevalence of the practice of informal or hidden secretaries.<sup>1061</sup> This is because those carrying out these

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<sup>1058</sup> Interviewee # 15, 34

<sup>1059</sup> Chapter 7 discusses in detail the formal appointment and appointment practices.

<sup>1060</sup> Refer Section 3.6. in Chapter 3 for discussion of these limitations.

<sup>1061</sup> However, for argument of such practice being widespread, Benjamin F. Hughes, *supra* note 11.

responsibilities in this manner do not advertise them publicly. Therefore, it is difficult, in a practical sense, to locate those with such experience for purpose of this empirical study. Therefore, this thesis does not comment upon the prevalence of such practices. It confines itself to their role and responsibilities on the basis of the interviewees who had experienced this first hand. What the empirical survey does reveal however is their role, scope of duties and the reasons of why they did act in such capacities.

#### 6.5.1. INFORMAL AND UNDISCLOSED SECRETARIES

The discussion on tribunal secretaries and principle of *intuitu personae* is incomplete without the discussion of informal and hidden secretaries.<sup>1062</sup> The question over the presence of another person, beyond the tribunal members, privy to the proceedings justifiably raises suspicion and leads to the greater doubts over the tribunal's integrity and functioning.<sup>1063</sup> Therefore, this concern has a bearing on the legitimacy of practice of ICA.<sup>1064</sup> Additionally, such practice raises practical questions as to the confidentiality, independence, impartiality and the duties discharged by such tribunal secretaries.<sup>1065</sup> In practice, it has been observed, for instance, the presence of an associate at a law firm copied in the email correspondences or presence of an unknown person alongside the arbitrator throughout the proceedings.<sup>1066</sup>

Study of practices means to study what people really do either unconsciously, without realizing the meaning of those actions and out of habit, or, on account of certain conditions that promote such practice.<sup>1067</sup> The key concern with regard to reconstructing the practice of informal and

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<sup>1062</sup> For instance, *Id.*; Constantine Partasides, *supra* note 5.; Maarten Draye and Emily Hay, *supra* note 174.; Zachary Douglas, *supra* note 14.; YOUNG ICCA GUIDE, *supra* note 388. Pg. 5 where this concern was specifically noted that some arbitrators habitually relied on assistance without any formal appointment or even identification of such assistants to the parties.

<sup>1063</sup> Constantine Partasides, *supra* note 5.; Benjamin F. Hughes, *supra* note 11.; Paul Di Pietro, *supra* note 349. Pgs. 106-107;

<sup>1064</sup> Constantine Partasides, *supra* note 5.; Benjamin F. Hughes, *supra* note 11.

<sup>1065</sup> Benjamin F. Hughes, *supra* note 11.; Paul Di Pietro, *supra* note 349.

<sup>1066</sup> Paul Di Pietro, *supra* note 349. Pgs. 106-107; Jean Pierre-Fierens, *supra* note 17.

<sup>1067</sup> Kaczmarczyk and Lam, *supra* note 243. "By practices, we understand what people really do, irrespective of the values they have in mind. Practices are often not reflected upon or may even be unconscious, when a person does not realize the meaning of an action and keeps to it out of habit. Certain practices may be emulated or enforced by the conditions of action."; Jeffrey Dunoff and Mark A. Pollack, *supra* note 270. Argue that it is necessary to look beyond structure-agency dichotomy and acknowledge the role of semi-structured interviews in assisting in understanding the practices, "Particularly controversial in this regard is the use of interviews to attempt to recreate practices that cannot be directly accessed by researchers. Interpretivists note that while practitioners might be able to recount, or represent, to an interviewer the material and social nature of practices after the fact, respondents' accounts may suffer from poor or incomplete recall, or even dishonesty, and are thus inferior to the direct observation and 'insider' perspective afforded by participant observation. And for positivists, who seek to test hypotheses about causal relationships, often on the basis of statistical analysis of large, random data samples,

hidden secretaries would be that of speculation or aggrandizement of their role by those who acted as tribunal secretaries. Thus, the empirical study confines itself to the responses received from the interviewees acknowledging the possibility that there may be divergence in terms of experience and practice by others. This is a practical difficulty especially in relation to undisclosed secretaries in locating respondents who have such experience and in triangulating their experience.

In order to better discern these practices, the thesis sub-divides such role into two categories, namely, informal secretaries and hidden secretaries. By informal secretaries, it means those secretarial support that was carried after their presence was made known to the parties but lacked any formalized mandate in terms of appointment, for instance, recording it in Procedural Order no. 1. In such cases, the parties were aware of presence of the secretarial support, though, without the benefit of application of any institutional rules or exactitude of the their role, responsibilities and disclosures that a formal appointment would have likely brought. The Yukos appointment is an example in this regard where the tribunal secretary was disclosed to the parties in the initial procedural conference as being someone to assist in the conduct of the case and whom the parties can approach in case the presiding arbitrator is unreachable.<sup>1068</sup> The Yukos case lacked a formal appointment as a tribunal secretary with clear delineation of duties, submissions of documents of disclosure and impartiality or even a formal recording in tribunal's orders.<sup>1069</sup> Similarly, Pierre Tercier specifically notes the presence of informal assistance acknowledging their presence for both the presiding arbitrator and even for co-arbitrators.<sup>1070</sup>

Undisclosed secretary means reliance on secretarial support unknown to the parties and even other arbitrators. It lacks any formal recording in any of the orders of the tribunal or submission of documentation with regard to the secretary, even if the parties or other arbitrators estimate

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interviews raise fundamental questions about selection, validity, and reliability. Despite these reservations, a growing number of interpretivist scholars have acknowledged that ethnographic and semi-structured interviews can provide a valuable window onto otherwise unobservable practices, as well as the meanings that actors attribute to those practices”

<sup>1068</sup> Expert Opinion of Professor George A Bermann (Hulley Enterprises and Ors. v. The Russian Federation 1:14-CV-01996-ABJ), *supra* note 15. Para 101

<sup>1069</sup> *Id.* Para 102

<sup>1070</sup> Pierre Tercier, *supra* note 9. Pg. 535, 550, “To the extent that his person is not involved in official communications with co-arbitrators or parties and remains the “private” assistant of the concerned arbitrator, the parties should not be entitled to object to this kind of assistance.”

the presence of such support. Because of this, it is different from informal support where the parties and arbitrators are informed of the presence of tribunal secretary.

### **6.5.2. DISCUSSION FROM THE EMPIRICAL STUDY**

Most respondents in this empirical study who had acted as tribunal secretary were appointed formally as tribunal secretaries.<sup>1071</sup> That is, the parties and co-arbitrators knew of their appointment and as a result, they were present throughout the proceedings from the time of their appointment.<sup>1072</sup> This is so because the perception that there was something inherently wrong with having tribunal secretary has undergone change and that there was a distinct danger of having undisclosed secretaries in view of change in institutional rules.<sup>1073</sup>

A tribunal secretary acknowledged that while most of her appointments were formal, that is, recorded as part of the proceedings, she had experience of being an informal tribunal secretary in a particular arbitration.<sup>1074</sup> This was because of that institution's rules that lacked provisions and guidance on tribunal secretaries, including that of appointment of tribunal secretary. She recounted that her appointment was made known to the parties and that they did not object to her being the tribunal secretary. She was accordingly marked on subsequent communications. In terms of duties, she reported no difference from other appointments with the same arbitrator. This included managing the record and drafting responsibilities that were no different from other appointments with the same arbitrator. Similarly, another tribunal secretary noted having experience as informal secretary and that there was no difference in work responsibilities.<sup>1075</sup>

A tribunal secretary stated that the arbitrator she works with informs the institution of her presence even when the arbitrator is a co-arbitrator and in such situation, her work is more limited towards preparing internal notes for the benefit of the co-arbitrator.<sup>1076</sup> Another tribunal secretary recounted that she was once appointed as a formal tribunal secretary on account of working relationship with one of the co-arbitrators in that arbitration.<sup>1077</sup>

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<sup>1071</sup> Code: Appointment, Interviewee # 1, 3, 5, 8, 9, 10, 11, 13, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 33

<sup>1072</sup> Code: Transparency

<sup>1073</sup> Interviewee # 6, 11, 22, 27, 35

<sup>1074</sup> Interviewee # 5

<sup>1075</sup> Interviewee # 24

<sup>1076</sup> Interviewee # 26

<sup>1077</sup> Interviewee # 33

Similarly, an arbitrator recounted an experience where a co-arbitrator informed the arbitrators and the parties that she relied upon an assistant who would be present during the hearings and assist the co-arbitrator.<sup>1078</sup> Another arbitrator too noted instances when co-arbitrators were assisted by their respective secretaries.<sup>1079</sup>

In effect, these are instances of informal appointment where the specifics of formality of appointments (like recording in a procedural order or submitting documents of conflict and impartiality) were never completed but the parties and the arbitrators were aware of the presence of a tribunal secretary. The situation with undisclosed secretarial support is different on account of absence of knowledge of either the parties or the co-arbitrators.

An arbitrator, with background as tribunal secretary, recounted instances where she was working on two cases for a senior colleague without any appointment or the parties being informed of her presence.<sup>1080</sup> She stated that her duties included preparation of the file and assisting in drafting. However, the respondent emphasized that she never engaged in the decision-making or drafting of the reasoning part of the award. In her words, she was more of an administrative secretary in that role and that the arbitrators engaged with the arbitral record.

Another respondent recounted similarly working without disclosure to the parties and other arbitrators while working on the arbitration as she would ordinarily do except not being able to attend the hearings or the deliberations.<sup>1081</sup> She stated that she carried out all the duties of tribunal secretary without being appointed as one.

Another respondent recounted of working on multiple arbitrations with a particular arbitrator where she was not formally appointed as tribunal secretary and thus, her responsibilities were more limited towards researching specific inquiries and did not have access to the arbitral record in such instances.<sup>1082</sup>

Tribunal secretaries also recounted being in assistance role with a particular arbitrator, including, when that arbitrator was acting as a co-arbitrator.<sup>1083</sup> In such cases there responsibilities did not differ except that the drafting of the award would be initiated by the

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<sup>1078</sup> Interviewee # 10

<sup>1079</sup> Interviewee # 17

<sup>1080</sup> Interviewee # 25

<sup>1081</sup> Interviewee # 21

<sup>1082</sup> Interviewee # 14

<sup>1083</sup> Interviewee # 26, 29

presiding arbitrator and therefore, their responsibilities remained confined to preparation of summaries, assisting in terms of locating documents or, any ongoing or pending deadline as well as preparation of any point that the co-arbitrator wanted for deliberations.

The arbitrators recounted similar experiences. An arbitrator shared an experience of witnessing parallel zoom screens with the same name as another arbitrator during the hearings as well as deliberations with the clear implication as to the presence of an undisclosed secretary.<sup>1084</sup> This was echoed by another senior arbitrator, with background as head of an IAC as well as tribunal secretary, of learning of an undisclosed secretary only when the arbitrator filled in the time sheet at the conclusion of the arbitration.<sup>1085</sup>

An arbitrator narrated an instance involving a co-arbitrator who came prepared with summaries and requested the presence of her assistant during the deliberations.<sup>1086</sup> This request was denied by the arbitrator as well as the presiding arbitrator and during the deliberations, they understood that the co-arbitrator's knowledge of the case was limited to the preparatory material prepared by the assistant. Similar lack of preparation and knowledge of the file from arbitrators was also recounted by another interviewee who was shocked to see the extent of dependence that that arbitrator had on the tribunal secretary.<sup>1087</sup>

On the other hand, arbitrators also expressed preference for occasional reliance on junior lawyers to have a discussion on a specific point or issues of an ongoing arbitration.<sup>1088</sup> The reasoning being to have the benefit of opinion of someone who is uninterested in the outcomes of the case.<sup>1089</sup>

However, the interviewees, with background as arbitrator or institutional secretaries, acknowledged that it was not possible to police the use of undisclosed secretaries.<sup>1090</sup> An institutional secretary explained that if the parties were not suspicious of presence of an undisclosed secretarial support then, she could not act as a secretary working for an IAC.<sup>1091</sup>

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<sup>1084</sup> Interviewee # 4

<sup>1085</sup> Interviewee # 31

<sup>1086</sup> Interviewee # 15

<sup>1087</sup> Interviewee # 6, 9

<sup>1088</sup> Interviewee # 6, 15

<sup>1089</sup> Interviewee # 15

<sup>1090</sup> Interviewee # 2, 6, 11, 14

<sup>1091</sup> Interviewee # 14

What differentiates an informal secretary from that of hidden secretarial assistance is the absence of knowledge of the parties and even co-arbitrators and consequently, absence of their consent. But in practice, tasks that are done by the tribunal secretaries continue to remain the same with the tribunal secretaries noticing no difference, except their absence during the hearings and deliberations, from the work that would be delegated to them. However, the situation was slightly different when the informal secretary acted on behalf of one of the co-arbitrator because usually it is the responsibility of the presiding arbitrator to prepare the first drafts of orders and the award. However, across the board, the practice of being tribunal secretary, either informal or undisclosed included maintaining the records, informing the arbitrators of any upcoming or ongoing issue, preparation of summaries and even, drafting of non-dispositive and factual parts of the orders and awards.

#### 6.5.3. SUMMING UP

As a conclusion, the empirical survey did not find any instance where the tribunal secretary who acted in an informal or undisclosed capacity to have usurped the decision-making responsibility of the arbitrators. This does not mean that the respondents did not express situations where they experienced an oversized influence of the tribunal secretary over the arbitrator or a situation where the tribunal secretary carried out substantial portion of work.<sup>1092</sup> Rather, an arbitrator experienced a co-arbitrator to be over reliant on the notes provided by his secretary.<sup>1093</sup> This is also not deny those instances of undisclosed secretarial support that may have breached the principle of *intuitu personae* as has been reported anecdotally in the literature.<sup>1094</sup>

What this empirical study found was that those who had acted as tribunal secretaries, either informally or in an undisclosed manner, did not even in single case report having exercised decision-making. Though, there were references with respect to other arbitrators who significantly relied on their tribunal secretaries but without clarifying whether these tribunal secretaries acted in informal or undisclosed capacities.<sup>1095</sup>

It is a limitation of this thesis that those who have acted in an undisclosed capacity as tribunal secretaries could not be identified publicly and thus, interviewed in larger numbers. Therefore,

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<sup>1092</sup> Interviewee # 6, 9

<sup>1093</sup> Interviewee # 15

<sup>1094</sup> For instance, Zachary Douglas, *supra* note 14.

<sup>1095</sup> Interviewee # 12, 14, 31

in this regard there is also a limitation of this thesis that full scope of practice of hidden secretarial support could not be identified, including, whether there is a practice with regard to undisclosed secretarial support within the ICA community that is shared and widespread. As one interviewee put it that there might be isolated cases of over-reliance but it does not have any bearing on the wider practice of employing tribunal secretaries.<sup>1096</sup> In words of another interviewee, that there is now a recognition that there is nothing inappropriate about having tribunal secretaries and thus, greater willingness to be transparent.<sup>1097</sup>

## **6.6. CONCLUSION: BETWEEN AMBITION AND DILIGENCE**

Few conclusions stand out: first, that both the arbitrators and the tribunal secretaries are aware of the principle of *intuitu personae* and thus, the limitations of secretarial assistance. There is a clear acknowledgment of this principle and the same was apparent in the recounting of experiences and visualization of this role by the respondents.<sup>1098</sup> That in practice, whether it be drafting responsibilities or responsibilities during deliberations, the role of the tribunal secretaries was circumscribed through direction, supervision and revision in a manner that retained decision-making with the arbitrators.

Second, this ties in with the institutionalization of principle of *intuitu personae* with the shared values and practices of the ICA community. It corresponds to the needs of the arbitrators for assistance by able secretaries and it corresponds to the ambition of younger members striving to learn the ropes and be part of this community. The principle of *intuitu personae* in this manner is central to the relationship between the arbitrators and tribunal secretaries. It determines how arbitrators effectively supervise the tribunal secretaries as well as how tribunal secretaries carry out their tasks in order to learn the practicalities of arbitration.

In effect, what also stands out in responses was the understanding that being a tribunal secretary had significant learning potential in the pursuit of their careers, especially, as a route to be an arbitrator.<sup>1099</sup> An arbitrator with extensive experience as a tribunal secretary put it simply that one has to understand what one can draw from this role and that her approach was to learn what it meant to be arbitrator when she acted as a tribunal secretary.<sup>1100</sup> Another arbitrator cited the

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<sup>1096</sup> Interviewee # 6

<sup>1097</sup> Interviewee # 35

<sup>1098</sup> Refer Section 6.2.3. for detailed discussion on the empirical findings.

<sup>1099</sup> Theme: Ambition, Interviewees # 3, 4, 8, 14, 16, 26, 27, 32

<sup>1100</sup> Interviewee # 27

example of transition to be an arbitrator by the aforementioned arbitrator as crucial to her decision to work as a tribunal secretary.<sup>1101</sup>

An interviewee, a tribunal secretary that was leaving legal work altogether, stated it simply that one must have greater goals when one acts as a tribunal secretary.<sup>1102</sup> This meant that those who acted as tribunal secretaries also took different career pathways, including, joining a law firm as a counsel or working as an institutional secretary.<sup>1103</sup> There was an acknowledgement from the arbitrators and tribunal secretaries alike that working as tribunal secretary enabled to understand both the process of conducting an arbitration and witnessing at close quarters how decisions are taken.<sup>1104</sup> As a sitting head of an IAC and also an arbitrator put it that being a tribunal secretary was the closest way to learn what it means to be an arbitrator.<sup>1105</sup> Another arbitrator put it quite simply as school of arbitration first class.<sup>1106</sup>

There was unanimity among the respondents that acting as a tribunal secretary gave a more hands-on knowledge of *hows* to conduct an arbitration by witnessing variety of procedural issues as well as seeing the *whats* that go into the decision-making of the tribunal.<sup>1107</sup> This is because acting as tribunal secretaries exposed them to greater number of cases and seeing the evolution of the case from the beginning to the end.<sup>1108</sup> In this way, it was different from working at a large law firm that usually means handling fewer large cases for a longer period of time.<sup>1109</sup> Being a tribunal secretary is thus a stepping-stone, in the words of an arbitrator, to see the whole process of arbitration.<sup>1110</sup> It exposed the tribunal secretaries to different styles and approaches, including that of writing in a neutral tone that is open to both the sides.<sup>1111</sup> It also enabled them to get insights into how tribunal works, including thought process of the arbitrators, how to behave with them, how tribunal reacts to parties, assesses credibility of

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<sup>1101</sup> Interviewee # 3

<sup>1102</sup> Interviewee # 24

<sup>1103</sup> Code: Career Trajectory. Refer Chapter 7 for detailed discussion.

<sup>1104</sup> Code: Learning by Doing

<sup>1105</sup> Interviewee # 7

<sup>1106</sup> Interviewee # 9

<sup>1107</sup> Code: Learning by Doing, Interviewees # 3, 4, 5, 6, 10, 9, 11, 12, 15, 17, 19, 21, 22, 24, 26, 27, 28, 29, 30, 31, 33, 34, 35

<sup>1108</sup> Code: Learning by Doing, Interviewees # 11, 12, 15, 24, 27, 31

<sup>1109</sup> Interviewee # 22, 27, 31

<sup>1110</sup> Interviewee # 10

<sup>1111</sup> Code: Learning by Doing, Interviewees # 19, 27, 33, 34

witnesses and how deliberations unfold.<sup>1112</sup> This was cited as a benefit if the tribunal secretary decides or also works as a counsel in understanding how to behave as a counsel and what is effective.<sup>1113</sup> Finally, tribunal secretaries stated that it allows for comparison of their own reasoning and assessment with that of the tribunal leading to learning of how arbitrators deal firsthand with variety of issues, including, learning that there is more than one way of assessment.<sup>1114</sup> In this manner, it assisted them in transitioning to be an arbitrator more confidently.<sup>1115</sup> Arbitrators and counsels viewed it served as an excellent training and learning opportunity for younger associates and being a tribunal secretary was the closest way to learn what it means to be an arbitrator.<sup>1116</sup> A senior arbitrator with background as global head of international arbitration practice in a global law firm acknowledged that the current generation was more ambitious and curious and actively solicited the work as tribunal secretary when working in the law firm.<sup>1117</sup> Finally, those with experience as both tribunal secretaries and institutional secretaries highlighted that acting as tribunal secretary gave a clearer understanding of how arbitration unfolds whereas acting as an institutional secretary provides for an overview of arbitration without understanding its details or dynamics.<sup>1118</sup>

The interviewees noted that being a tribunal secretary was a demanding task requiring knowledge of the file, ability to anticipate issues that may arise and to be prepared to answer any inquiries that the arbitrators may have.<sup>1119</sup> As a senior arbitrator put it that the expectation from the tribunal secretaries was that they would see the bigger picture of the arbitration and not confine themselves to micro-tasks that come along.<sup>1120</sup> That being a tribunal secretary was lot of hard work that was needed to be done properly, including, knowing the file, reading the submissions as they come in, following the instructions of the arbitrators and remind the tribunal of any upcoming timelines.<sup>1121</sup> It meant to stand in arbitrators' shoes by anticipating what is coming next in order to make their work easier so that they can focus on the issue at

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<sup>1112</sup> Code: Learning by Doing, Interviewees # 3, 4, 10, 11, 17, 19, 21, 28, 30, 33

<sup>1113</sup> Interviewee # 6, 12, 17, 24

<sup>1114</sup> Interviewee # 17, 19, 26, 27

<sup>1115</sup> Interviewee # 10, 11, 21, 27

<sup>1116</sup> Interviewee # 4, 7, 8, 9, 10, 15, 35

<sup>1117</sup> Interviewee # 22

<sup>1118</sup> Interviewee # 2, 3, 8, 14, 16, 32

<sup>1119</sup> Theme: Diligence

<sup>1120</sup> Interviewee # 15

<sup>1121</sup> Code: Navigating, Interviewees # 9, 17, 18, 19, 24, 26, 30, 31, 33, 34

hand.<sup>1122</sup> Moreover, it meant following the direction of the tribunal in order to carry out the tasks that were delegated to them.<sup>1123</sup> This crucial to navigating the role of tribunal secretary by tribunal secretaries and arbitrators alike.<sup>1124</sup> Following the instructions of the tribunal and not attempt to engage in decision-making is a shared value that is held as part of the identity of being a tribunal secretary and by the arbitrators supervising them.<sup>1125</sup>

Being a tribunal secretary is thus to stand at the cross-roads of ambition, to be either an arbitrator or be a member of the ICA community, and diligence, of learning the process of arbitration and being prepared to assist the arbitrators. The rewards for the diligent secretary are therefore a learning experience by witnessing full arbitration run its course at close quarters. It is also a process of learning by doing the myriad tasks that come along ranging from keeping track of correspondence to being in attendance at deliberations. These advantages were recognized across the board by the interviewees, irrespective of whether they were arbitrators or tribunal secretaries.<sup>1126</sup> In other words, none of the interviewees had a diminished view of learning opportunities associated with this role. This is the second conclusion of this chapter

Finally, the choice of semi-structured interviews as a methodological choice led to an understanding of the values of this community. And through development of hypotheticals, for instance, whether the interviewees would intervene in case of error of fact during the deliberations, and detail oriented questions, it allows for understanding the practices that cannot be observed through fieldwork.<sup>1127</sup> This chapter discussed the institution of *intuitu personae* as exemplified through IAC guidelines and judgments of domestic Courts through adoption of comparative analysis in order to bring out how the ICA community understands this institution as well as to present a holistic picture of normativity of this principle.<sup>1128</sup>

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<sup>1122</sup> Interviewee # 4, 30, 31

<sup>1123</sup> Code: Direction, Supervision & Revision

<sup>1124</sup> Code: Navigating, Interviewees # 10, 17, 19, 21, 24, 26, 28, 31, 33, 34

<sup>1125</sup> Kaczmarczyk and Lam, *supra* note 243.; MOSHE HIRSCH, *supra* note 262. Pgs. 94-95; Refer Section 3.2.2. of Chapter 3 for more fuller discussion on values.

<sup>1126</sup> Code: Learning by Doing, Interviewees # 3, 4, 5, 6, 10, 9, 11, 12, 15, 17, 19, 21, 22, 24, 26, 27, 28, 29, 30, 31, 33, 34, 35

<sup>1127</sup> Jeffrey Dunoff and Mark A. Pollack, *supra* note 270.

<sup>1128</sup> Refer Section 3.3. of Chapter 3 for discussion on comparative method and institutional bricolage.; Refer Section 6.2.4. and 6.2.5. for detailed discussion on institution of principle of *intuitu personae*.

## CHAPTER SEVEN

### UNDER THE TUTELAGE: JOINING THE ICA COMMUNITY

“I have been fortunate in having extremely bright young talents join me over the years (several of whom are cleverer than I was at their age), but they seek intensive exposure to international arbitration, which they will only find in my Chambers (at least for now), and I have been even more fortunate to have built up a strong personal relationship with each of my associates even after their departure from my Chambers.”<sup>1129</sup>

“The career path of Professor Lalive prepared him for arbitration but could as easily have led to distinction in other areas. ... He first became involved with international arbitration at that time when he served as *grefter* - a kind of law clerk, also called secretary - in one of the relatively few arbitrations of the time”<sup>1130</sup>

#### 7.1. INTRODUCTION

The preceding two chapters discussed what it means to be a tribunal secretary in terms of doing tasks. In other words, what are the responsibilities of tribunal secretary and how do they carry them out. This chapter is about why people become tribunal secretaries. That is, what aspirations do they have and how do they navigate their careers. In other words, it is an inquiry into the role of tribunal secretary and its place within the ICA community.

In order to answer this, it becomes necessary to preface it with how appointments occur. That is, to engage with the rules set out by different IACs and inform this study of surface law with that of the understanding within the ICA community and findings from the empirical study. This is relevant because even though professional accreditations exist<sup>1131</sup> but they are unlike domestic bar accreditation in two crucial respects. First, they are not gatekeeping accreditations, that is, their absence does not mean that a person cannot be an arbitrator or an

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<sup>1129</sup> MICHAEL HWANG S. C., *supra* note 672. Pg. 18

<sup>1130</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pg. 20

<sup>1131</sup> For instance, Chartered Institute of Arbitrators Training at CIArb: Training, <https://www.ciarb.org/training/> (last visited Feb 19, 2024).

arbitration counsel. Second, they are neither guarantees, that is, having these accreditations do not mean that the person will be appointed as arbitrators or get an opportunity to represent as counsels. This is significantly different from domestic legal practice where there are clearly laid down rules and pathways to be counsel or a judge.

This serves as an important backdrop to the inquiry as to its place within the ICA community because it reveals how the appointments occur institutionally and in practice. This then ties in with the different career strategies that younger professionals employ to be a tribunal secretary and subsequently after having been a tribunal secretary.

Therefore, this chapter opens with the section on the value of transparency and its relationship with appointments. Various institutional rules are discussed to present the formal requirements of appointment. Thereafter, the value of transparency, that is, disclosure and consent of the parties within the extant literature are discussed before proceeding to the findings from the empirical study.

The next section begins with the discussion on briefly who constitute the ICA community followed by discussion on its social identity as well as ongoing professionalization. Thereafter, the findings on career trajectories, networking and transition to arbitrator from the empirical study are discussed.

The final section concludes the chapter.

## **7.2. TRANSPARENCY AND APPOINTMENT AS A TRIBUNAL SECRETARY**

This section opens with the discussion on the institutions for appointment of tribunal secretaries. Here the institutional rules enacted by IACs are discussed to identify their *tronc commun*. It is supplemented with reference to empirical studies and writings of the practitioners in order to identify the centrality of principle of transparency, that is, seeking parties' consent prior to the appointment of the tribunal secretary.

Thereafter, this value of transparency is zoomed-in to discuss the extant literature in order to understand how the ICA community views this value and its reasons for doing so. This adds to the preceding discussion by bringing sharper focus to the value of transparency.

Thereafter, the findings from the empirical study are discussed. This includes discussion on at what stage appointments occur and how do they occur. Thereafter, the importance of prior relationships as part of practice of appointment is discussed. Finally, the findings on how views have changed with respect to the appointment of tribunal secretary and what it means for the

principle of transparency are presented. Before concluding, the instances of potential non-adherence to this practice are discussed.

### 7.2.1. INSTITUTIONAL RULES, GUIDELINES AND FORMAL MANDATE

While Dasser and Igbokwe have argued against promulgating soft law instruments questioning as to who should promulgate such instrument and whether there can be one-size-fits-all approach towards regulating tribunal secretaries.<sup>1132</sup> They reasoned that there are differences in approach towards tribunal secretaries and thus, uniform standard would not be satisfactory nor might be adhered to as a matter of practice. They argued that it might choke competition between different IACs that in turn, would be disadvantageous to improvement and innovation.

But empirical surveys have consistently found majority of respondents favoring regulation of tribunal secretaries. For instance, Young ICCA Survey found majority of respondents in favor of regulating tribunal secretaries with overwhelming majority of over 78% in favor of guidelines of best practices.<sup>1133</sup> This was so because presence of such guidelines would provide guidance as to what was and what not appropriate, including, who might be appointed as tribunal secretaries, how to pay for the services and the limits of such service.<sup>1134</sup> This was also reiterated in another survey by QMUL with 68% respondents in favor of regulating the role of tribunal secretaries.<sup>1135</sup> A clear majority of 70% respondents favored regulation through IACs reasoning that this would minimize any potential delegation of decision-making related tasks.<sup>1136</sup>

Polkinghorne and Rosenberg have argued that the absence of common guidelines added to the uncertainty of the role of tribunal secretary and thus, having a negative bearing on the legitimacy of the arbitral process as a whole.<sup>1137</sup> It cited empirical surveys, including the Young ICCA survey, to argue that it was possible to have common standards regulating the role of tribunal secretaries and in turn, advocated series of standards for adoption as uniform standard.<sup>1138</sup> The first recommendation was a declaration from the proposed secretary of

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<sup>1132</sup> Felix Dasser and Emmanuel O. Igbokwe, *supra* note 175. Pgs. 313-314

<sup>1133</sup> YOUNG ICCA GUIDE, *supra* note 388. Pg. 3

<sup>1134</sup> *Id.* Pg. 34

<sup>1135</sup> Paul Friedland and Loukas Mistelis, *supra* note 115. Pg. 3

<sup>1136</sup> *Id.* Pg. 44

<sup>1137</sup> Michael Polkinghorne and Charles B Rosenberg, *supra* note 16. Pg 121

<sup>1138</sup> *Id.* Pgs. 121-122

“Statement of Impartiality and Independence” alongside a disclosure of any circumstances that may give rise to justifiable doubts.<sup>1139</sup> This standard was designed to identify any potential conflicts of interest so that the parties can object in a prior and informed manner to the appointment of the tribunal secretary.<sup>1140</sup>

The Young ICCA survey cited by Polkinghorne and Rosenberg has been influential in as much as being cited by the England and Wales High Court in the case of *P v Q* as part of its reasoning.<sup>1141</sup> The Young ICCA Survey was the result of Young ICCA Task Force consisting of young ICA practitioners to codify best practices in relation to tribunal secretaries.<sup>1142</sup> It did so on the basis of two quantitative surveys carried out in 2012 and 2013 in order to develop a best practice guideline supported by reasoning behind their advocacy. It found that 72.4% of respondents favored parties’ consent prior to the appointment of the tribunal secretary and in its 2013 survey found 83.5% of respondents in favor of the secretary filing a statement of independence and impartiality.<sup>1143</sup>

In the last decade, the arbitral institutions too have come out with institutional rules and practice notes to regulate the appointment, duties and remuneration of the tribunal secretaries. Some of these rules were discussed in Chapter 4 in order to craft the definition of tribunal secretary.<sup>1144</sup> In the discussion of rules from four leading jurisdictions associated with ICA, the requirements of prior consent of the parties and signing of statements of independence and impartiality were *tronc commun* of the rules being shared by all the four IACs.<sup>1145</sup>

Very briefly, ICC, Paris mandates that the tribunal inform the parties of its decision to be assisted by tribunal secretary by sharing the proposed candidate’s CV as well as declaration of independence and impartiality and to refrain from appointing a tribunal secretary if any of the parties object.<sup>1146</sup> HKIAC, Hong Kong leaves the choice of appropriate candidate for appointment as tribunal secretary to the tribunal but requires it to consult the parties before any

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<sup>1139</sup> *Id.* Pg. 122

<sup>1140</sup> *Id.* Pg. 122

<sup>1141</sup> Popplewell J., *supra* note 648. Para 56

<sup>1142</sup> YOUNG ICCA GUIDE, *supra* note 388.

<sup>1143</sup> *Id.* Pgs. 5-9

<sup>1144</sup> Refer Section 4.4.2. of Chapter 4.

<sup>1145</sup> ICC, Paris, HKIAC, Hong Kong, SIAC, Singapore and SCC, Stockholm.; Karton, *supra* note 389.

<sup>1146</sup> International Chamber of Commerce, *supra* note 434. Paras 220-221

appointment is made.<sup>1147</sup> It also requires that the proposed candidate declares his or her impartiality and independence as well as discloses any circumstances that may give rise to justifiable doubts about impartiality or independence.<sup>1148</sup> SIAC, Singapore has a skeletal regulation for appointment of tribunal secretaries.<sup>1149</sup> But it also mandates that the parties' consent is taken prior to the appointment and document on independence and impartiality is shared with the parties.<sup>1150</sup> Similarly, SCC, Stockholm requires that the tribunal seeks prior consent from the parties before appointing the tribunal secretary and documents of independence and impartiality are shared with its Secretariat.<sup>1151</sup>

Also, London Court of International Arbitration [hereinafter, LCIA] also updated its rules in 2017 to regulate assistance through tribunal secretaries.<sup>1152</sup> In its recent rules, changes were adopted to specifically require a Statement of Independence by the proposed tribunal secretary prior to the appointment.<sup>1153</sup> As a result, the appointment is conditioned upon approval by all the parties alongside sharing of the declaration of impartiality and independence by the proposed secretary.<sup>1154</sup>

What the foregoing presents are the requirements for formal mandate for the appointment of tribunal secretary. The institutional rules have converged at least to this extent that there is a specific consent taken from the parties prior to the appointment of tribunal secretary and that the proposed tribunal secretary is required to sign declaration of independence and impartiality and disclose any potential conflicts prior to the appointment. To this extent, it is safe to say that this has become widely used and adopted institution for appointment of tribunal secretary being *tronc commun* as to the formal process of appointment.<sup>1155</sup>

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<sup>1147</sup> Hong Kong International Arbitration Centre, *supra* note 447. Para 2.1

<sup>1148</sup> *Id.* Para 2.2

<sup>1149</sup> Practice Note for Administered Cases – On the Appointment of Administrative Secretaries, *supra* note 442.

<sup>1150</sup> *Id.* Para 4

<sup>1151</sup> Stockholm Chamber of Commerce, *supra* note 455. Article 24

<sup>1152</sup> LCIA Arbitration Rules, 2020, *supra* note 825.

<sup>1153</sup> LCIA, *LCIA Implements Changes to Tribunal Secretary Processes*, (2017), <https://www.lcia.org/News/lcia-implements-changes-to-tribunal-secretary-processes.aspx> (last visited Jun 9, 2024).

<sup>1154</sup> LCIA Arbitration Rules, 2020, *supra* note 825. Rules 14.9 and 14.10

<sup>1155</sup> Refer Sections 3.2.4. and 3.3. of Chapter 3 for more fuller discussion on institutions and identifying common principles through comparative method. More specifically, refer, Karton, *supra* note 389. And Emmanuel Gaillard, *supra* note 296.

In this manner, these institutional rules create normativity at least to the extent of seeking the consent of the parties and sharing formal documentation as to independence, impartiality and disclosure of any potential conflicts by the proposed tribunal secretary. Though in and of itself an institutional rule acts as a sanction only to the extent of arbitrations administered by that IAC but on account of convergence of these rules, it is submitted that these two criterion have gained a normative force with respect to the formal appointing process and resulting mandate of tribunal secretary. This is so because of their adoption by leading IACs reflect convergence in terms of institutional legitimacy, procedural legitimacy and acceptance within the ICA community and thus, this process of appointment can be termed as a soft law possessing normativity within the ICA community.<sup>1156</sup>

### 7.2.2. THE VALUE OF TRANSPARENCY

In a recent writing on tribunal secretaries and the question of transparency, Constantine Partasides, a senior arbitrator and also key author on numerous articles<sup>1157</sup>, including the Young ICCA Survey<sup>1158</sup>, has put the problem in two categories, first, presence of undisclosed secretarial support and second, a mismatch between the tasks entrusted to the secretary and those disclosed to the parties.<sup>1159</sup> Reflecting on undisclosed secretarial support, another leading arbitrator Benjamin Hughes has suggested three reasons as to the lack of full disclosure.<sup>1160</sup> These are reliance on assistants by the co-arbitrators irrespective of presence of a tribunal secretary, second, reliance on tribunal secretaries in excess of the acceptable limits so that arbitrators can take more appointments and third, reliance on tribunal secretaries by senior partners in law firms to accept appointments while also being able to carry out counsel work.

However, Pierre Tercier, another leading arbitrator, has argued for greater trust in the arbitrators making a case for reliance on informal assistance as long as the assistant works directly under the oversight of the arbitrator.<sup>1161</sup> But as the discussion in the previous subsection reveals that the situation has changed with all leading IACs mandating a formal process

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<sup>1156</sup> FELIX DASSER, *supra* note 279. Pgs. 253-263

<sup>1157</sup> For instance the article that coined the moniker ‘Fourth Arbitrator’ was penned by Constantine Partasides Constantine Partasides, *supra* note 172. And Constantine Partasides, *supra* note 322.

<sup>1158</sup> YOUNG ICCA GUIDE, *supra* note 388.

<sup>1159</sup> Constantine Partasides, *supra* note 5.

<sup>1160</sup> Benjamin F. Hughes, *supra* note 11. Pg. 167

<sup>1161</sup> Pierre Tercier, *supra* note 9. Pg. 550

for appointments of tribunal secretary putting the principle of consent of parties as a prerequisite to any appointment.

The principle of party autonomy is central to the practice of ICA being a guiding principle and ideological core.<sup>1162</sup> It is first of all a fact of ICA because parties must freely adopt it to decide their dispute. More importantly, it is also a norm deeply entrenched among within the ICA community with its practitioners making it pervasive through adoption in the treaties, national arbitration laws, rules of procedure and arbitral awards. It thus forms key part of the paradigm of its practitioners as well as part of its episteme to justify and explain their practices.<sup>1163</sup> What therefore follows is that the institutional rules by linking the appointment of tribunal secretary to prior informed consent of parties is upholding this principle of party autonomy.

Additionally, these rules and the extant literature makes this linkage with parties consent also as upholding the value of transparency. That is, there is proper disclosure to the parties so that they can make their decision in an informed manner. The last decade is witness to this centralizing of the value of transparency in the institutional rules as well as emphasis from the practitioners.<sup>1164</sup> In his survey of institutional rules and case law, Professor Filip De Ly argues that it is the best practice to seek consent of parties in order to avoid any problems as to the legitimacy and integrity of that proceeding subsequently.<sup>1165</sup>

The ground of maintaining legitimacy of the practice of ICA emerges centrally in the discussions on need for transparency.<sup>1166</sup> It is so because of distinct danger on account of potential subpoena requests from those that acted in an undisclosed manner as part of challenge of the award.<sup>1167</sup> Or, as Yukos proceedings revealed the use of hours billed by the tribunal secretary and writing analysis to argue for setting-aside of award.<sup>1168</sup>

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<sup>1162</sup> JOSHUA KARTON, *supra* note 27. Pgs. 78-80

<sup>1163</sup> For a discussion on paradigm of ICA practitioners, Anthea Roberts, *supra* note 10.

<sup>1164</sup> Zachary Douglas, *supra* note 14. Pg. 88; YOUNG ICCA GUIDE, *supra* note 388. Pgs 7-9; Maarten Draye and Emily Hay, *supra* note 174. Pgs. 86-90; Benjamin F. Hughes, *supra* note 11. Pgs. 162-163; Felix Dasser and Emmanuel O. Igbokwe, *supra* note 175. Pg. 311-12

<sup>1165</sup> Filip De Ly, *supra* note 211. Pg. 26

<sup>1166</sup> YOUNG ICCA GUIDE, *supra* note 388. Pg. 5

<sup>1167</sup> Zachary Douglas, *supra* note 14. Pgs. 87-88

<sup>1168</sup> Expert Opinion of Professor George A Bermann (Hulley Enterprises and Ors. v. The Russian Federation 1:14-CV-01996-ABJ), *supra* note 15.

All this is so because absence of transparency arouses doubts as to the role that the tribunal secretary may have played in determination of the award and thus, casting doubt not only over that particular arbitration proceeding but also the process of arbitration generally.<sup>1169</sup> To put it differently, non-disclosure of assistance means that the arbitrator or the tribunal is representing that the entire work is done by them and that if seeking assistance is considered legitimate then there are no reasons why seeking such assistance is not disclosed.<sup>1170</sup> Additionally, it may lead to apprehensions that such non-disclosure occurred due to taking of secretarial support that did not find support in the institutional rules under which that arbitration occurred.<sup>1171</sup> For instance, Paul Di Pietro, an institutional secretary with ICC, Paris, mentions being witness to practice where there is no formally appointed tribunal secretary and yet, an associate from the presiding arbitrator's law firm is copied in the email correspondence and who in turn, sometimes sends correspondence to the parties.<sup>1172</sup> Thus, leading to doubts and misapprehension as to who all had access to the arbitral record and who was working on it.

In simple words, this principle of transparency expressed in terms of prior informed consent of parties and disclosures of independence and impartiality has become a shared value within the ICA community and resulting in both informal and undisclosed forms of assistance being considered unacceptable.<sup>1173</sup> This is expressed in quantitative surveys like Young ICCA survey and BLP Survey of 2015 with majority of respondents indicating clear preference for prior parties consent in the appointment of tribunal secretary.<sup>1174</sup>

Thus, a picture emerges from the literature on tribunal secretaries. In an ordinary course of proceedings, tribunal secretary is appointed with the proposal originating from the presiding arbitrator in a three-member tribunal.<sup>1175</sup> This usually means that the tribunal secretary so

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<sup>1169</sup> Constantine Partasides, *supra* note 5.

<sup>1170</sup> Benjamin F. Hughes, *supra* note 11. Pg. 167

<sup>1171</sup> *Id.*

<sup>1172</sup> Paul Di Pietro, *supra* note 349. Pg. 106

<sup>1173</sup> YOUNG ICCA GUIDE, *supra* note 388.; Sophia Elisabeth Von Dewall, *supra* note 796.; Zachary Douglas, *supra* note 14.; Constantine Partasides, *supra* note 172.; Constantine Partasides, *supra* note 5.; Maarten Draye and Emily Hay, *supra* note 174.

<sup>1174</sup> YOUNG ICCA GUIDE, *supra* note 388. Found 72.4% of respondents in favor of prior consent of parties.; Bryan Cave Leighton Paisner, *International Arbitration: Research Based Report on the Use of Tribunal Secretaries in International Commercial Arbitration,* (2015), [https://www.bclplaw.com/a/web/150137/BLP\\_International\\_Arbitration\\_Survey\\_2015.pdf](https://www.bclplaw.com/a/web/150137/BLP_International_Arbitration_Survey_2015.pdf) (last visited Jun 10, 2024). Pg. 2 found 76% respondents stating that party consent was important prior to the appointment of tribunal secretaries.

<sup>1175</sup> Pierre Tercier, *supra* note 9. Pg. 549

appointed is from the chair or sole arbitrator's firm with the consequence being that the presiding arbitrator is familiar with the secretary's skill and experience and can easily communicate with the secretary.<sup>1176</sup> At core of appointment lies the pre-existing work relationship between the presiding arbitrator and the tribunal secretary.<sup>1177</sup> The value of transparency, nested within the value of party consent, requires that the parties are made aware of existence of tribunal secretary, including the nature of tasks to be delegated, so that they make informed choice at the very outset.<sup>1178</sup> Yukos case has been a watershed with regard to the appointment and reliance on secretarial support.<sup>1179</sup> This would mean that the presiding arbitrator would make all the disclosures about the proposed candidate for tribunal secretary alongside the nature of assistance and proposed fee structure.<sup>1180</sup>

To sum up, the value of transparency, that is, prior disclosure to the parties and seeking their consent is a value that the ICA community wants to show adherence to in order to ensure legitimacy of that particular proceeding but also for the practice of ICA itself. This is a shared value within the ICA community because being nested within the value of party consent, it is what ICA community respects and relies on to demonstrate legitimacy.<sup>1181</sup> In this manner, it is part of the shared episteme of the ICA community acting as a validity test to evaluate their actions as well as explaining their actions.<sup>1182</sup> Being nested within the value of party consent, the value of transparency has become part of the social identity of ICA community finding support in the institutional rules as well as in literature.<sup>1183</sup>

### 7.2.3. DISCUSSION FROM THE EMPIRICAL STUDY

The empirical study also confirms the foregoing for appointment of tribunal secretaries. The presiding arbitrator was the person who usually recommended the tribunal secretary.<sup>1184</sup> The

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<sup>1176</sup> Maarten Draye and Emily Hay, *supra* note 174. Pgs 85-86

<sup>1177</sup> *Id.*

<sup>1178</sup> Zachary Douglas, *supra* note 14. Pg. 88; Sophia Elisabeth Von Dewall, *supra* note 796.

<sup>1179</sup> Maarten Draye and Emily Hay, *supra* note 174. Pg. 82; Felix Dasser and Emmanuel O. Igbokwe, *supra* note 175. Pg. 311

<sup>1180</sup> Zachary Douglas, *supra* note 14. Pg. 90

<sup>1181</sup> Refer Section 3.2.2. of Chapter 3 for greater discussion on the meaning of what is a value.; More specifically, refer, Kaczmarczyk and Lam, *supra* note 243. Pg. 717

<sup>1182</sup> Andrea Bianchi, *supra* note 25.

<sup>1183</sup> Refer Section 3.2.2. of Chapter 3 for greater discussion. More specifically, MOSHE HIRSCH, *supra* note 262. Pgs. 94-95

<sup>1184</sup> Code: Chair

tribunal secretary worked directly with the presiding arbitrator acting on his instructions and communicating with him.<sup>1185</sup> Assisting the presiding arbitrator was central to navigating the relationship with the tribunal and it was presiding arbitrator who was expected to circulate any drafts to the rest of the tribunal.<sup>1186</sup> This practice was so common that in experience of an arbitrator with background as tribunal secretary that she continued to remain the tribunal secretary even after the original presiding arbitrator changed during the course of the proceedings.<sup>1187</sup> However, a tribunal secretary narrated an instance of her appointment as originating from recommendation of a co-arbitrator.<sup>1188</sup>

The tribunal secretaries were usually appointed as early in the proceedings as possible, usually, from the moment of preparation of Procedural Order no. 1.<sup>1189</sup> The reason for this preference of early appointment was on account of having secretarial support in preparation of early procedural orders.<sup>1190</sup> Though, it was acknowledged that sometimes the tribunal understood the complexity of the proceedings only after the proceedings were underway and in those cases, the tribunal secretaries were appointed later.<sup>1191</sup> The importance of Procedural Order no. 1 for appointment of tribunal secretary was on account of being able to record parties' consent and formally appoint the tribunal secretary.<sup>1192</sup> The parties' consent in such situations was taken during the course of finalization of this procedural order. Though, an interviewee pointed out that it created the technical issue of tribunal secretary working to prepare the procedural order no. 1 before the appointment is formalized using that order but in practice it did not lead to any issue.<sup>1193</sup> Two senior arbitrators, with over two decades of experience, emphasized to not being able to recall a situation where parties objected to appointing of a proposed tribunal secretary.<sup>1194</sup> However, another interviewee mentioned an instance of objecting to appointment

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<sup>1185</sup> Interviewees # 4, 15, 19, 22, 23, 24, 28, 31

<sup>1186</sup> Interviewees # 7, 17, 23

<sup>1187</sup> Interviewee # 21

<sup>1188</sup> Interviewee # 33

<sup>1189</sup> Refer, Albert Jan van den Berg, *supra* note 645. Pgs. 419-421 and Paulo Michele Patocchi and Robert Briner, *supra* note 685. Pgs. 283-285 for discussion on procedural order no. 1.; Code: Appointment

<sup>1190</sup> Interviewees # 15,18, 19, 21, 26

<sup>1191</sup> Interviewees # 24, 34

<sup>1192</sup> Interviewees # 6, 18, 19, 24

<sup>1193</sup> Interviewee # 18

<sup>1194</sup> Interviewees # 6, 34

of a tribunal secretary on account of his perception of degree of influence the proposed candidate had.<sup>1195</sup> However, she did so when she was herself an arbitrator in that proceeding.

There was also a clear convergence in practice of appointments through such formalization of parties' consent and executing of any necessary documents required under the institutional rules.<sup>1196</sup> One of the interviewees who had experience working informally, that is, with the co-arbitrator without being a tribunal secretary to the entire tribunal noted that the formalization of her mandate was dependent on the role the arbitrator she worked with had in the tribunal.<sup>1197</sup> Therefore, when the arbitrator acted as a co-arbitrator, she acted informally with the arbitrator disclosing her presence to the IAC with her role being circumscribed as not including presence during the hearings or deliberations. Another tribunal secretary noted that she acted in an informal manner in an arbitration because the institutional rules for the conduct of the arbitration did not provide for appointment of tribunal secretary but, even then, the parties were informed of her role as a tribunal secretary.<sup>1198</sup>

Only two interviewees who experienced acting as undisclosed tribunal secretaries.<sup>1199</sup> Similarly, two arbitrators narrated experiences of witnessing undisclosed secretarial support.<sup>1200</sup> First pertained to witnessing parallel zoom screens having the same name as an arbitrator and the latter pertained to a co-arbitrator who sought to bring in her assistant during the deliberations that neither of the other two arbitrators were aware.<sup>1201</sup>

At center of the appointments lay a relationship of trust and rapport between the tribunal secretary and the presiding arbitrator.<sup>1202</sup> As an arbitrator with background as tribunal secretary put it that the arbitrators appoint only those that they are very comfortable working with.<sup>1203</sup> A tribunal secretary who had worked with multiple arbitrators stated that there was never an instance where the presiding arbitrator did not know her and her work before appointing her.<sup>1204</sup>

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<sup>1195</sup> Interviewee # 9

<sup>1196</sup> Code: Formal Mandate, Interviewees # 8, 9, 11, 18, 19, 26, 34

<sup>1197</sup> Interviewee # 26

<sup>1198</sup> Interviewee # 5

<sup>1199</sup> Interviewees # 21, 25

<sup>1200</sup> Interviewees # 4, 15

<sup>1201</sup> Interviewees # 4, 15

<sup>1202</sup> Code: Navigating, Interviewees # 19, 21, 24, 26, 35

<sup>1203</sup> Interviewee # 21

<sup>1204</sup> Interviewee # 24

Thus, prior relationship either on account of the proposed secretary working directly as an associate in the same law firm or arbitration chambers of appointing arbitrator or experience of having worked with the proposed secretary is crucial to appointments.<sup>1205</sup> An arbitrator explained the preference for appointing associates from her law firm as her preference when appointing a tribunal secretary because she would be aware of the skills and maturity of the proposed secretary.<sup>1206</sup> The other advantage being that it was easy to communicate because the secretary would be working in the same office. Another arbitrator who too preferred appointing associates from her law firm as tribunal secretary cited this ease of communication with associates at law firm with approval.<sup>1207</sup> A large number of interviewees with experience as tribunal secretary echoed this.<sup>1208</sup>

Another set of interviewees noted that joining a setup of arbitration chambers, that worked akin to traditional barrister's chambers but primarily for arbitrators, led to appointments.<sup>1209</sup> This was so because the physical venue and the nature of the chambers enabled greater interaction between the arbitrators and tribunal secretaries.<sup>1210</sup> In turn, once the arbitrators became familiar with the work a secretary, they continued to relied on them and even recommended them further.<sup>1211</sup> A tribunal secretary with experience of working with multiple arbitrators stated that the strength of reference of the first arbitrator she worked with enabled her to secure further appointments from other arbitrators within the chambers.<sup>1212</sup> However, a tribunal secretary pointed out that she decided to not take the route of being associated with such chambers on account of mandatory payments that the secretaries had to share with the chambers.<sup>1213</sup>

Two tribunal secretaries noted that that key difference in terms of institutional rules was the method of remuneration with their experience of ICC, Paris (that prohibits additional fees from the parties on account of appointment of tribunal secretaries) being the most different.<sup>1214</sup> It

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<sup>1205</sup> Code: Prior Relationship, Interviewees # 3, 19, 17, 21, 24, 25, 26

<sup>1206</sup> Interviewee # 6

<sup>1207</sup> Interviewee # 15

<sup>1208</sup> Interviewee # 1, 11, 12, 17, 21, 25, 26, 29, 30, 31

<sup>1209</sup> Interviewees # 3, 5, 18, 20, 27

<sup>1210</sup> Interviewee # 3

<sup>1211</sup> Interviewees # 3, 5, 18, 27

<sup>1212</sup> Interviewee # 18

<sup>1213</sup> Interviewee # 26

<sup>1214</sup> Refer Section 4.4.2.1. of Chapter 4 for discussion on institutional rules of ICC, Paris.; More specifically, refer, International Chamber of Commerce, *supra* note 434. Paras 229-230

was noted that terms of remuneration were better discussed at the stage of appointment with the appointing arbitrator if the tribunal secretary was acting as an independent tribunal secretary, for instance, as part of the arbitration chambers.<sup>1215</sup> An interviewee also narrated an experience where the parties hadn't paid her fees following which the tribunal decided to hold the release of the award till she was paid.<sup>1216</sup> An arbitrator with background as tribunal secretary specifically noted to cross-check the fees and hours submitted by the tribunal prior to issuing her own bills.<sup>1217</sup> Ostensibly, this could be the Yukos effect where the hours billed by tribunal secretary exceeded those of the arbitrators becoming one of the probative factors to argue for setting-aside of the award.<sup>1218</sup> An arbitrator noted that usually the parties would do object to proposal of fees for the tribunal secretary when it is made reasonably.<sup>1219</sup> The situation is simpler for those who act as tribunal secretary working in a law firm or directly with an arbitrator because here the remuneration would simply be the ordinary salary that the associate would draw.

As noted in discussion on institutional rules in Chapter 4, some IACs allow the members of its Secretariat to act as tribunal secretaries.<sup>1220</sup> A total of six interviewees had experience working as tribunal secretary while being an institutional secretary with an IAC.<sup>1221</sup> They stated that such requests for appointment originated from the tribunal<sup>1222</sup> or were mandatory under the institutional rules of that particular IAC.<sup>1223</sup> In cases where the request originated from the tribunal, three interviewees stated the experience of multiple appointments after the arbitrators had worked with them.<sup>1224</sup> In all such cases, following of the proper procedure for appointment under the rules of that IAC was always followed.

A senior arbitrator with over two decades of experience stated that over the last few decades, there has been greater acknowledgment that there is nothing inherently wrong in having a

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<sup>1215</sup> Interviewee # 18, 19

<sup>1216</sup> Interviewee # 21

<sup>1217</sup> Interviewee # 19

<sup>1218</sup> Refer, Expert Opinion of Professor George A Bermann (Hulley Enterprises and Ors. v. The Russian Federation 1:14-CV-01996-ABJ), *supra* note 15. Paras 109-114

<sup>1219</sup> Interviewee # 4

<sup>1220</sup> Specifically, refer discussion on HKIAC Guidelines in Section 4.4.2.3. of Chapter 4.

<sup>1221</sup> Code: Institutional Secretaries, Interviewees # 2, 8, 9, 13, 19, 31

<sup>1222</sup> Interviewees # 2, 8, 19

<sup>1223</sup> Interviewees # 9, 13, 31

<sup>1224</sup> Interviewees # 2, 8, 19

tribunal secretary.<sup>1225</sup> The clarity from the institutional rules as well as conversations within the ICA community had created sufficient awareness and thus, confidence in arbitrators to be open about appointing of tribunal secretaries with the parties. That is, transparency as to having a tribunal secretary assist the tribunal is a key change in the views about tribunal secretary. Arbitrators also emphasized that isolated cases of impermissible delegation did not mean that the entire practice of tribunal secretaries be eliminated.<sup>1226</sup> With one senior arbitrator arguing that, the concern around fourth arbitrator had been taken to extremes and presence of assistance should not mean overturning of the award.<sup>1227</sup>

The interviewees noted that there had been change in views regarding tribunal secretaries in the last decade or so with there being more openness towards appointing of tribunal secretaries.<sup>1228</sup> Only one interviewee disagreed stating that it is hard to tell the extent of change in terms of appointments because of absence of any statistical evidence.<sup>1229</sup> However, she noted that there is greater awareness within the ICA community as opposed a decade ago with recognition of dangers of employing tribunal secretaries in an undisclosed manner.

Yukos case was cited as having brought change in institutional rules and therefore, greater familiarity with the role and formal processes of appointment.<sup>1230</sup> It was pointed out that the release of institutional rules had led to greater confidence among arbitrators to disclose secretarial use with secretaries as unacceptable becoming a minority view.<sup>1231</sup> One interviewee noted that because of these changes in attitudes and release of institutional guidelines, it was now possible for tribunal secretaries to form interest associations as well as represent themselves as an independent tribunal secretary.<sup>1232</sup> An arbitrator with over two decades of experience noted this change in having come across a young practitioner that was planning to set herself up as an independent tribunal secretary working for multiple arbitrators.<sup>1233</sup>

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<sup>1225</sup> Interviewee # 35

<sup>1226</sup> Interviewee #6, 10

<sup>1227</sup> Interviewee # 10

<sup>1228</sup> Code: Changing View, Interviewees # 4, 10, 13, 27, 31, 35

<sup>1229</sup> Interviewee # 11

<sup>1230</sup> Interviewees # 2, 12, 25, 31

<sup>1231</sup> Interviewees # 6, 13, 27, 29, 34

<sup>1232</sup> Interviewee # 11

<sup>1233</sup> Interviewee # 12

However, another arbitrator pointed out that there was still negative connotation attached to having tribunal secretaries because some perceive this to mean that a lot of work is being delegated to the tribunal secretary.<sup>1234</sup> The empirical study revealed constant reference by the arbitrators to know of other practitioners that heavily relied on their tribunal secretaries without proper disclosure to the parties.<sup>1235</sup> Multiple arbitrators also used the term hypocrisy to refer to practice of other arbitrators.<sup>1236</sup> What they meant by hypocrisy was arbitrators usurping the work done by the tribunal secretaries, whether formally appointed or informal or undisclosed, as being done by them.<sup>1237</sup>

For instance, an arbitrator noted of having witnessed another arbitrator to take the time of the tribunal secretary as her own while filling time sheets.<sup>1238</sup> While, another arbitrator noted having seen time sheets filled (for charging the parties) about a tribunal secretary that none of the arbitrators or the parties knew about.<sup>1239</sup> Another interviewee noted to know other tribunal secretaries that were working on substantive drafting in relation to the awards.<sup>1240</sup> An arbitrator echoed this observation stating that some of the leading arbitrators with over twenty ICA cases were delegating far more work to the tribunal secretaries than they were admitting.<sup>1241</sup> Another arbitrator termed it as a fantasy to assume that leading arbitrators were doing the entirety of their work on their own because they just had too many cases than can be managed by one individual.<sup>1242</sup>

This tendency to take more ICA cases than one could handle was explained as a business decision for those arbitrators that did not have counsel practice because not all arbitrations go into hearing and therefore, the economics of sustaining a private arbitrator practice required such practitioners to take more cases than they could handle.<sup>1243</sup> An arbitrator with over three decades of experience noted that the key change in practice of ICA was that three decades ago,

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<sup>1234</sup> Interviewee # 15

<sup>1235</sup> Interviewees # 4, 12, 14, 15, 17, 23, 30, 31

<sup>1236</sup> Interviewees # 4, 9, 12, 15, 23

<sup>1237</sup> Interviewees # 4, 15, 23

<sup>1238</sup> Interviewee # 15

<sup>1239</sup> Interviewee # 31

<sup>1240</sup> Interviewee # 14

<sup>1241</sup> Interviewee # 12

<sup>1242</sup> Interviewee # 4

<sup>1243</sup> Interviewee # 15

arbitrators would have three to four ICA cases while, the numbers now were around twenty ICA cases for leading arbitrators.<sup>1244</sup> He saw this as the reason as to greater reliance on tribunal secretaries by leading arbitrators arguing that because of having so many cases, it was no longer possible to handle every detail of each case personally by the arbitrator. For instance, an arbitrator recounted her experience as a counsel appearing in arbitrations involving a senior arbitrator meant identifying who was the appointed tribunal secretary because this revealed whether the proceedings would occur smoothly or not.<sup>1245</sup>

An interesting observation is in order here that none of the arbitrators who spoke of such practices of other arbitrators stated to have engaged in them. One way of understanding this is that the sample of interviewees did not include arbitrators who were employing such practices. Another view, a more critical one, would be that the strength of principle of transparency and *intuitu personae* as values to be adhered to is so strong that the respondents were unwilling to share such experiences in relation to themselves.

Having said so, twenty-three respondents, including arbitrators and tribunal secretaries, stated that the parties' consent prior to the appointment of the tribunal secretary was a necessity and that they experienced it so, whether acting as an arbitrator or tribunal secretaries.<sup>1246</sup> The practice of parties' consent was emphasized as central to the appointment process, irrespective of whether it occurred through recording in procedural orders or through appointment from IACs.

In sum, what emerges is the centrality of the parties' consent as expressed through the value of transparency alongside its practice. The respondents emphasized how crucial this was to the appointment process of the tribunal secretary. This comes alongside observations of 'other practitioners' who do not fully adhere to this value in terms of practicing it.

#### 7.2.4. SUMMING UP

In summary, both the literature and the empirical findings of this thesis support the idea of transparency, that is, informing and taking parties' consent as to the appointment emerges as a shared value. In view of the fact that party autonomy is considered to be a defining principle,

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<sup>1244</sup> Interviewee # 23

<sup>1245</sup> Interviewee # 15

<sup>1246</sup> Code: Transparency, Interviewees # 3, 4, 5, 6, 8, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 24, 26, 27, 28, 29, 30, 32, 35

it is not surprising that the same is being articulated with respect to tribunal secretaries.<sup>1247</sup> Moreover, quantitative surveys, like the Young ICCA Survey, too strongly support the view that the appointment of tribunal secretary ought to be disclosed and parties' consent to be specifically taken before the appointment.<sup>1248</sup> This has the added benefit of minimizing any challenge by the parties later on the grounds of appointment or nature of tasks carried out by the tribunal secretary.<sup>1249</sup> In this manner, this is a value that ICA community respects and employs to legitimize its practices.<sup>1250</sup> Transparency being linked to party autonomy makes it also part of its episteme, that is, a value that is employed for taking and validating practices.<sup>1251</sup>

Having acknowledged that there is a strong unanimity in the literature<sup>1252</sup> as well as in the empirical study<sup>1253</sup> regarding transparency and ensuring that the appointment of tribunal secretary is formalized, yet, there has been constant concern that the same may not be true across the board<sup>1254</sup>. This was frequently cited as instances of other arbitrators by the respondents with no arbitrator acknowledging having worked with informal or undisclosed secretarial support. At core, it reflects the strength of the value of transparency within the ICA community. This is enshrined in its institutions as well with all leading IACs requiring parties' consent and formalization of mandate of the tribunal secretary through signing of documents declaring their independence and impartiality.

Put together, it shows that transparency, that is, appointing of tribunal secretary with parties' consent and disclosures as to independence and impartiality is an institution, value and a practice within the ICA community. Even though there might be instances where this may not be fully adhered to but as some of the respondents pointed out that such instances should not

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<sup>1247</sup> JOSHUA KARTON, *supra* note 27. Pgs. 79-80

<sup>1248</sup> YOUNG ICCA GUIDE, *supra* note 388.

<sup>1249</sup> Felix Dasser and Emmanuel O. Igbokwe, *supra* note 175.

<sup>1250</sup> Refer Section 3.2.2. of Chapter 3 for detailed discussion on value.; More specifically, Kaczmarczyk and Lam, *supra* note 243.

<sup>1251</sup> Andrea Bianchi, *supra* note 25.

<sup>1252</sup> For instance, YOUNG ICCA GUIDE, *supra* note 388.; Constantine Partasides, *supra* note 172.; Constantine Partasides, *supra* note 5.; Maarten Draye and Emily Hay, *supra* note 174.; Zachary Douglas, *supra* note 14.

<sup>1253</sup> Code: Transparency, Interviewees # 3, 4, 5, 6, 8, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 24, 26, 27, 28, 29, 30, 32, 35

<sup>1254</sup> Constantine Partasides, *supra* note 5.; Benjamin F. Hughes, *supra* note 11.

lead to either discrediting the role of the tribunal secretaries or the more widely accepted practice.

### **7.3. CAREER TRAJECTORIES AND JOINING THE ICA COMMUNITY**

Very briefly, the ICA community consists of arbitrators, arbitration lawyers, academics writing and specializing in international arbitration as well as members of secretariats of IACs.<sup>1255</sup> This is so because they constitute an issue based community that is in constant communication with itself.<sup>1256</sup> Moreover, its members employ strategies that combine these different roles as part of the pursuit of their professional goals with its leading members acting or having acted in these different roles.<sup>1257</sup>

This section discusses different career strategies employed by those who act as tribunal secretaries in order to join this ICA community. This includes being identified by its existing members besides possessing the technical knowledge of doctrines of ICA.

This section opens briefly with the discussion on what constitutes the ICA community before focusing on its professionalization in the last half a century. The steps taken by most notably HKIAC to train and accredit tribunal secretaries is discussed as part of this professionalization. This is necessary in order to better appreciate what it means to be a member of the ICA community and thus, understand how younger practitioners navigate to join this community.

Thereafter, the findings from the empirical study are discussed to identify career strategies of younger professionals who have acted as tribunal secretary. This includes their aspiration to be an arbitrator but is not confined to the same. It also discusses the impact of being institutional secretary and the career strategies adopted by some of the interviewees to have this dual experience.

In sum, this section presents the findings of this thesis of how does being a tribunal secretary relates professionally to the ICA community at large. Through this, the key argument that is also the title of this thesis that being a tribunal secretary is a step in the ladder to join the ICA community is discussed.

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<sup>1255</sup> Refer Section 2.2. of Chapter 2 for detailed discussion of the literature and who constitutes the ICA Community.

<sup>1256</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pgs. 15-16; Andrea Bianchi, *supra* note 25.; Anthea Roberts, *supra* note 10.

<sup>1257</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pgs. 34-40

### 7.3.1. THE PROFESSIONALIZATION OF THE ICA COMMUNITY

As mentioned in the introductory section of this chapter, there are no licensing or formal accreditations to be an ICA practitioner. That is, there is no prior licensing requirement as exists in domestic jurisdictions to be an ICA practitioner.<sup>1258</sup> Nor, any formal accreditations, like those by CIArb<sup>1259</sup>, guarantee work as an arbitrator or an arbitration lawyer. Schinazi specifically recognizes this glaring absence in his inquiry into professionalization of practice of ICA.<sup>1260</sup> Therefore, being a member of this community means being recognized as its member by those in the ICA community.<sup>1261</sup>

Schinazi identifies three components to this professionalization.<sup>1262</sup> First, that the practice of ICA requires technical and specialized knowledge. Second, development of specialized academic programs alongside rise of professional associations of its practitioners. Third, a distinct set of norms and values that are shared among its practitioners.

The requirement of technical and specialized knowledge to practice ICA is not a novel observation. Dezelay and Garth recognized this promotion of specialized knowledge in their assessment of origins of ICA with whom they termed as ‘Young Technocrats’.<sup>1263</sup> They identified that this cohort promoted its technical competencies in conduct of arbitration in order to succeed professionally.<sup>1264</sup> This involved working through leading ICAs where they acquired expertise while administering arbitrations. Another route was through large Anglo-American law firms where they built specialization in services of dispute resolution for their clients. The benefit of these two routes being able to develop reputation as arbitrators or arbitration lawyers. The upshot of all this being steady judicialization, that is, adoption of specialized procedures for the conduct of ICA.

Florian Grisel has made a different case for the judicialization of ICA.<sup>1265</sup> He has argued this on account of the growth of business disputes as well as demands for consistency with Anglo-

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<sup>1258</sup> MIKAËL SCHINAZI, *supra* note 4. Pg. 201

<sup>1259</sup> CIArb: Training, *supra* note 1131.

<sup>1260</sup> MIKAËL SCHINAZI, *supra* note 4. Pg 201

<sup>1261</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pg. 37

<sup>1262</sup> MIKAËL SCHINAZI, *supra* note 4. Pgs. 196-201

<sup>1263</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pg. 40

<sup>1264</sup> *Id.* Pg. 40

<sup>1265</sup> Florian Grisel, *supra* note 7.

American law firms already part of the ICC arbitrations prior to the 1970s.<sup>1266</sup> He argues that this specialization of procedures occurred well before the period identified by Dezelay and Garth because of need of harmonization from both common and civil law traditions.<sup>1267</sup>

A more critical view is advanced by Katharina Pistor with respect to this development of specialized and technical knowledge of ICA.<sup>1268</sup> She argues that the rise of Anglo-American global law firms led to greater reliance on arbitration as a method for dispute resolution with the opinions of private attorneys and arbitrators steadily displacing the need for reliance on case laws. That is, as the size and number of arbitrations increased, the need for services of private attorneys increased so as to be able to substitute what the domestic Courts would likely say.<sup>1269</sup> To put it simply, ICA practice is largely conducted away from the domestic Courts minimizing their interference and thus, giving substantial leeway for its practitioners to craft procedures and their justifications.

All this ties in with the observation of Dezelay and Garth as well as Andrea Bianchi that the practice of ICA constitutes an epistemic community.<sup>1270</sup> This means this specialized and technical knowledge is a shared set of normative beliefs that provide basis for analysis of practices as well as notions of validity to evaluate these practices.<sup>1271</sup> The steady increase of judicialization, that is, specialized procedures for the conduct of ICA means that its practitioners have to learn these shared set of normative beliefs within the ICA community while building their reputation within this community as being aware and competent to put them into action.

Additionally, there has been a rise of specialized courses and accreditations with respect to ICA.<sup>1272</sup> This involves academic and professional programs conducted by universities as well as private associations upon whose successful completion the candidates can identify

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<sup>1266</sup> *Id.* Pgs 808-809

<sup>1267</sup> *Id.*

<sup>1268</sup> KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019). Pgs. 181-182

<sup>1269</sup> *Id.* Pg. 182

<sup>1270</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pg. 16; Andrea Bianchi, *supra* note 25.

<sup>1271</sup> Andrea Bianchi, *supra* note 25.

<sup>1272</sup> MIKAËL SCHINAZI, *supra* note 4. Pgs 197-199

themselves with those credentials. For instance, leading universities offer specialized masters level programs whose focus is international arbitration.<sup>1273</sup>

This is true for tribunal secretaries as well. In June 2014, HKIAC launched the first-ever Tribunal Secretary Service alongside a training program for tribunal secretaries.<sup>1274</sup> This makes it the first among the IACs that offers such program with the objective of training younger professionals as well as its own staff to be accredited as a tribunal secretary.<sup>1275</sup> As part of this, it lists the names of those who successfully completed this training on its website. The outcome of this public listing is that those who complete this training are able to list it as a credential as part of their resume. HKIAC noted nineteen appointments as part of its tribunal secretary program in its 2018 report.<sup>1276</sup>

Finally, this professionalization also means the presence of a distinct culture of norms and principles among its members. It is an epistemic community that shares set of normative and principled beliefs that are employed by its members to carry out practices and justify them.<sup>1277</sup> Principle of party autonomy, that is, it is the parties' choice to arbitrate and determine how the arbitration is conducted is one of these central norms that is employed as a guiding principle and a general rule.<sup>1278</sup> Anthea Roberts has argued that principles like party autonomy and confidentiality are a paradigm associated with international commercial arbitration and thus, its members assume these principles as hallmark and obvious to the conduct of arbitration.<sup>1279</sup> DeZalay and Garth reason that this articulation of universal principles is because of the need of its practitioners to claim legitimacy for the procedures of ICA.<sup>1280</sup>

DeZalay and Garth argued that ICA community is partly an epistemic community while also being an extremely competitive market.<sup>1281</sup> Bianchi has made a more thorough inquiry arguing

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<sup>1273</sup> MIDS Program, <https://www.cids.ch/mids> (last visited Jun 11, 2024).; Sciences Po, *LLM in Transnational Arbitration and Dispute Settlement*, <https://www.sciencespo.fr/ecoile-droit/en/academics/llm-in-transnational-arbitration-and-dispute-settlement/> (last visited Jun 11, 2024).

<sup>1274</sup> HKIAC: Tribunal Secretary Training Programme, *supra* note 451.

<sup>1275</sup> *Id.*

<sup>1276</sup> Report on Use of HKIAC Tribunal Secretary Service, (2018), <http://hkiac.org/node/2299> (last visited Jun 11, 2024).

<sup>1277</sup> Andrea Bianchi, *supra* note 25.

<sup>1278</sup> JOSHUA KARTON, *supra* note 27.

<sup>1279</sup> Anthea Roberts, *supra* note 10.

<sup>1280</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6.

<sup>1281</sup> *Id.* Pg 16

that practitioners of international arbitration constitute an epistemic community.<sup>1282</sup> Bianchi argues this because it shares a set of collective beliefs, fixes the terms of discourse, produces a particular worldview, produces knowledge and puts it in practice and, creates a social identity of the discipline and profession.<sup>1283</sup>

Thomas Schultz and Robert Kovacs conducted an empirical research after fifteen years of the study by Dezelay and Garth and found that the arbitrators by 2010s saw themselves as managers.<sup>1284</sup> They found specialization in the practice of arbitration as the most important criteria for being an arbitrator.<sup>1285</sup> They also found that the ability to manage the proceedings was considered a key trait that was expected of the arbitrator.<sup>1286</sup> This meant to be able to conduct the proceedings smoothly and effectively and eventually to manage the process of issuance of the award.<sup>1287</sup> For instance, senior arbitrator Albert Jan van den Berg too argues that the organizing the arbitration is key duty of the chairperson in a manner that is tailored to the needs of the case.<sup>1288</sup>

All these means adherence to a particular worldview, for instance, preference for party autonomy, procedural fairness, efficiency and confidentiality of proceedings.<sup>1289</sup> The need for efficiency in view of judicialization has become part of this shared set of collective beliefs.<sup>1290</sup> This has led to offering of various proposals, including arbitrators playing greater role in facilitating settlements<sup>1291</sup>, tailoring procedures for specific cases<sup>1292</sup>, need for expedited

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<sup>1282</sup> Andrea Bianchi, *supra* note 25.

<sup>1283</sup> *Id.*

<sup>1284</sup> Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators?: Fifteen Years after Dezelay and Garth*, 28 ARBITRATION INTERNATIONAL 161 (2012).

<sup>1285</sup> *Id.* Pg. 170

<sup>1286</sup> *Id.* Pgs. 170-171

<sup>1287</sup> *Id.* Pg. 171

<sup>1288</sup> Albert Jan van den Berg, *supra* note 645.

<sup>1289</sup> Anthea Roberts, *supra* note 10.; Jennifer Kirby, *supra* note 547.; JOSHUA KARTON, *supra* note 27.; Andrea Bianchi, *supra* note 25.

<sup>1290</sup> Jennifer Kirby, *supra* note 547.; Loukas A. Mistelis, *Efficiency - What Else? Efficiency as the Emerging Defining Value of International Arbitration: Between Systems Theories and Party Autonomy*, in THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 349 (Thomas Schultz & Federico Ortino eds., 2020).; Andreas Respondek, *Five Proposals to Further Increase the Efficiency of International Arbitration Proceedings*, 31 JOURNAL OF INTERNATIONAL ARBITRATION 507 (2014).

<sup>1291</sup> Fali S. Nariman, *The Spirit of Arbitration: The Tenth Annual Goff Lecture*, 16 ARBITRATION INTERNATIONAL 261 (2000).

<sup>1292</sup> Thomas J Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 297 (2014).

procedures<sup>1293</sup> and broadening the pool of arbitrators<sup>1294</sup>. These proposals are discourse articulated towards a shared worldview of arbitration being more efficient than litigation and in turn, reflects a collective project that is in this case to find solutions for overcoming the challenge of judicialization.

Simultaneously, it means that its members form a shared group identity. Moshe Hirsch has argued that for a social identity to exist there has to be similarity and differences, that is, individuals and groups have some similarity and differentiation from others.<sup>1295</sup> As a result, where people identify with a group role, they act according to the meaning accompanying that identity.<sup>1296</sup> He argues that for such a community to exist as a social group, it must share basic norms, be concerned about the opinions and respect of the colleagues and visualize themselves as a community that shares practice of a discipline.<sup>1297</sup> The resulting paradigm that the community develops influences the answers that arise as part of dispute resolution as well as carrying out it out in practice.<sup>1298</sup> Thus, the findings of Dezelay and Garth<sup>1299</sup>, Florian Grisel<sup>1300</sup> and Anthea Roberts<sup>1301</sup>, provides a view of how its members act and view themselves. Though, each wrote about a different time period but what stands out is that the ICA community shares a group identity of being practitioners of ICA. This is what is most relevant for this discussion that joining the ICA community means to tap into the shared values and accompanying practices and thus, identify and be recognized as being associated with the ICA community.

In sum, what emerges is a social identity that shares the centrality of technical specialized knowledge that can bridge between different legal systems.<sup>1302</sup> Alongside this is a self-consciousness among the members of ICA community that they are engaged in a common shared enterprise that is geared towards providing dispute resolution services to the business

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<sup>1293</sup> Peter Morton, *Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?*, 26 ARBITRATION INTERNATIONAL 103 (2010).

<sup>1294</sup> Andreas Respondek, *supra* note 1290.

<sup>1295</sup> MOSHE HIRSCH, *supra* note 262. Pg 94

<sup>1296</sup> *Id.* Pgs. 94-95

<sup>1297</sup> Moshe Hirsch, *supra* note 47.

<sup>1298</sup> Anthea Roberts, *supra* note 10.

<sup>1299</sup> YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6.

<sup>1300</sup> Florian Grisel, *supra* note 7.

<sup>1301</sup> Anthea Roberts, *supra* note 10.

<sup>1302</sup> For instance, refer MIKAËL SCHINAZI, *supra* note 4. Pgs 196-201

community.<sup>1303</sup> Whether they see themselves as Grand Old Men, Young Technocrats or Managers or were Secant Marginals, there is a consciousness of this shared project in developing and promoting ICA as a legitimate means of resolving disputes.

Thus, what follows is that while there is no professional licensing that acts as a gatekeeping for becoming a member of this community but there has been steady and consistent professionalization. This requires its members and would-be aspirants to possess the technical and specialized knowledge that is associated with the practice of ICA. This requires understanding the shared set of values and principles of its practice. The rise of specialized academic programs as well as professional accreditations are one of the means through which this specialized knowledge maybe acquired and be advertised by those who complete it as part of demonstrating possession of this knowledge. All this leads to development of shared set of principles among its members that allows them to communicate with each other as well as justify and reason their actions in the conduct of arbitration. Put together, the foregoing reveals what it means to be a member of the ICA community.

### 7.3.2. DISCUSSION FROM THE EMPIRICAL STUDY

To be able to learn the practice of conduct of ICA stood out as a key appraisal among the interviewees.<sup>1304</sup> Twenty-seven respondents, including tribunal secretaries, arbitrators and, former and current heads of IACs cited learning potential as a key outcome of being a tribunal secretary.<sup>1305</sup> As discussed at length in Chapter 6,<sup>1306</sup> being tribunal secretary gave a close view and valuable insight into the conduct of arbitration. It exposed the tribunal secretaries to wide number of procedural issues while at the same time, being able to see how arbitrators managed these situations.<sup>1307</sup> It provided insight into how tribunal deliberates and what it considers relevant and thus, also providing valuable learning to be a counsel.<sup>1308</sup> Thus, without repeating the discussion from Chapter 6, the learning opportunity afforded by being a tribunal secretary is valuable to learn its technicalities, especially, in how it is put to practice. That is, what being

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<sup>1303</sup> Florian Grisel, *supra* note 7.; YVES DEZALAY AND BRYANT G. GARTH, *supra* note 6. Pgs 43-48

<sup>1304</sup> Code: Learning by Doing

<sup>1305</sup> Code: Learning by Doing, Interviewees # 3, 4, 5, 6, 7, 9, 10, 11, 12, 14, 15, 17, 19, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

<sup>1306</sup> Refer Section 6.6. of Chapter 6 greater discussion on learning the practice of ICA by being a tribunal secretary.

<sup>1307</sup> Code: Learning by Doing, Interviewees # 3, 4, 10, 11, 17, 19, 21, 28, 30, 33

<sup>1308</sup> Interviewee # 6, 12, 17, 24

tribunal secretary adds to those that act as one is being to see the law in action as opposed to learning the law in the books.

To round this off, a current head of IAC and an arbitrator put being a tribunal secretary as the first rank to learn how to arbitrate because of sitting next to the presiding arbitrator, having access to the arbitral record, following the hearings and witnessing the deliberations.<sup>1309</sup> Other senior arbitrators echoed this learning potential for a tribunal secretary to be an arbitrator as well.<sup>1310</sup>

More senior interviewees, that is with over two decades of experience, reflected that the current generation was more aware about ICA, including, various roles that it may pursue to join the community.<sup>1311</sup> An arbitrator with over three decades of experience and background as a global head of international arbitration practice with a leading global law firm reflected specifically with the generation of millennials as being highly aspirational and actively seeking appointments as tribunal secretary within the law firm to both enhance their learning as well as part of pursuit of their careers.<sup>1312</sup> More senior tribunal secretaries, that is with over a decade of experience, emphasized this aspirational aspect of being tribunal secretary and also opined that a key change in the last decade or so has been that the younger practitioners are actively seeking this role as part of the professional careers.<sup>1313</sup> One of them reflected that a decade ago being a tribunal secretary was not seen as a career choice when she commenced her career as a tribunal secretary with a leading arbitrator.<sup>1314</sup> An arbitrator who also teaches at a specialized master's level program narrated an experience of a student going straight to be an independent tribunal secretary after the completion of the course.<sup>1315</sup> She noted that this was a key change in as much she hasn't witnessed this with earlier cohorts of students. She also noted that this change was taking place in the ICA community itself, especially, with the launch a database for current and would-be tribunal secretaries to connect with arbitrators that may have need for them. This was reference to the initiative taken by Swiss Arbitration Association to partner

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<sup>1309</sup> Interviewee # 7

<sup>1310</sup> Interviewee # 4, 23

<sup>1311</sup> Code: Changing View, Interviewee # 6, 11, 7, 12, 21, 22, 29

<sup>1312</sup> Interviewee # 22

<sup>1313</sup> Interviewee # 21, 29

<sup>1314</sup> Interviewee # 29

<sup>1315</sup> Interviewee # 12

with JusConnect in order to launch a tribunal secretary platform.<sup>1316</sup> An arbitrator with background as tribunal secretary noted that the impact of formalization of rules with respect to tribunal secretaries has been to increase the number of independent tribunal secretaries (that is, those that do not work solely for an arbitrator but, rather a pool of them) including, setting up of interest associations to share their experiences and information.<sup>1317</sup> For instance, those acting as tribunal secretaries have setup an informal Linkedin group to connect with other fellow tribunal secretaries.<sup>1318</sup>

Those acting as tribunal secretaries and those that had been tribunal secretaries also revealed a marked aspiration to join the ICA community and specifically, to transition to being an arbitrator.<sup>1319</sup> Only one interviewee among the twenty-four interviewees with experience as tribunal secretary stated that she was leaving legal practice.<sup>1320</sup> However, even she acknowledged that there is a clear aspiration to join the ICA community and more specifically, be an arbitrator among those that act as tribunal secretaries. The theme of ambition is discussed more extensively in chapter 6 but what stands out is that the more younger of the respondents were aware of this role and actively sought appointments as tribunal secretary as part of their professional career goals.<sup>1321</sup> An arbitrator with extensive background as a tribunal secretary highlighted that it is up to the person concerned to use this role as part of their career trajectory.<sup>1322</sup> Another senior arbitrator pointed out experience of a regional IAC that was specifically promoting this post in order to use it as a training tool for young aspiring professionals.<sup>1323</sup>

Another arbitrator with background as tribunal secretary noted that her career towards transitioning to be an arbitrator was assisted because of her profile as young, female and

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<sup>1316</sup> ASA Announces Strategic Partnership with Jus Connect to Launch Tribunal Secretary Platform, <https://www.swissarbitration.org/asa-announces-strategic-partnership-with-jus-connect-to-launch-tribunal-secretary-platform/> (last visited Mar 4, 2024).

<sup>1317</sup> Interviewee # 11

<sup>1318</sup> Linkedin : Tribunal Secretary Network, <https://www.linkedin.com/company/tribunal-secretary-network/about/> (last visited Mar 4, 2024).

<sup>1319</sup> Theme: Ambition

<sup>1320</sup> Interviewee # 24

<sup>1321</sup> Refer Section 6.6. of Chapter 6 for detailed discussion on the theme of Ambition.; Interviewees # 3, 5, 14, 26, 33

<sup>1322</sup> Interviewee # 27

<sup>1323</sup> Interviewee # 34

qualified.<sup>1324</sup> She reflected that this was a key change for those with background as tribunal secretaries on account of knowing some male colleagues who were still awaiting appointments as an arbitrator. Another arbitrator who also acts as tribunal secretary noted that there has been greater push in diversity with gender becoming irrelevant.<sup>1325</sup>

However, this thesis does not make a generalization as to the gendered experience of the practitioners because as discussed in Chapter 3, such an examination deserves a doctoral research in its own right.<sup>1326</sup> Having said this, it is submitted that the discussion on career trajectories (as well as duties of tribunal secretary as discussed in Chapter 5 and 6) would be applicable to both while acknowledging that some of these trajectories maybe gendered leading to differentiation in terms of preferences. As a senior arbitrator with over three decades of experience quipped that, there was no difficulty to see a female as a tribunal secretary.<sup>1327</sup>

Two interviewees highlighted the relevance of the specialized masters programs that they attended to their professional career. The first interviewee cited it as part of his plan to move to jurisdiction with greater number of arbitration cases.<sup>1328</sup> She stated that the nature of the program was such that they were taught by actual practitioners who in turn were very candid about any vacancies that they had and the criterion for filling up those vacancies. She narrated her experience of being able to get interviews on the basis of her participation in the course. She termed this as the key difference with other master's level programs in her choice to pursue it. The second interviewee echoed the same goal of joining the ICA practice as key reason behind her choice of the specialized master's program.<sup>1329</sup> She stated that the eventual accreditation coupled with her language skills enabled her to become an institutional secretary with a leading IAC.

Two interviewees had attended the HKIAC tribunal secretary training program.<sup>1330</sup> They both stated that the course was instructive as to what it means to be tribunal secretary and both highlighted the eventual accreditation as a key reason behind their choice of completing the

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<sup>1324</sup> Interviewee # 21

<sup>1325</sup> Interviewee # 30

<sup>1326</sup> Refer Section 3.6. of Chapter 3 for discussion on the limitations of this thesis.

<sup>1327</sup> Interviewee # 22

<sup>1328</sup> Interviewee # 1

<sup>1329</sup> Interviewee # 8

<sup>1330</sup> Interviewees # 16, 32

program. Both stated that to able to state this on the CV was a key motivating factor for attending the course. One of them who attended the program in-person stated that it assisted in her ability to network because she came in contact with the instructors as well as other students.<sup>1331</sup> She also stated of having received consideration for appointment as tribunal secretary but that it did not materialize on account of potential conflict of interest. The other stated that she couldn't network as much because the program she attended was conducted online due to covid.<sup>1332</sup> One of the reasoning behind the launch of this training program was to retain the institutional secretaries by affording them the opportunity to be tribunal secretaries.<sup>1333</sup>

Networking, that is, getting to know people in the ICA community and getting known to them was highlighted as crucial by younger practitioners.<sup>1334</sup> As an interviewee put it that this is the way the world works because not all information is available on the internet.<sup>1335</sup> She stated that one of the advantages of being part of an arbitration chambers was that it acted as an ecosystem to learn about potential opportunities for both the roles of tribunal secretary and arbitrator. Another interviewee stated that she secured appointments as tribunal secretary because of her membership in a local arbitration professionals association.<sup>1336</sup> This eventually led her to join an arbitration chambers like ecosystem to work with multiple arbitrators. An independent tribunal secretary emphasized that she was an extensive networker and because of this she was able to put out that she was seeking appointments as tribunal secretary that eventually, led to further appointments.<sup>1337</sup> Other interviewees who stated to put their name out among the arbitrators that they were soliciting appointments as tribunal secretaries echoed this experience.<sup>1338</sup> An interviewee cited her publication of research articles as benefiting in networking because it allowed her to discuss her work with those she came in contact with.<sup>1339</sup>

Those with experience as institutional secretaries stated that IACs organized networking events routinely and that, getting the law firms and in-house counsels to learn about the ongoing

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<sup>1331</sup> Interviewee # 32

<sup>1332</sup> Interviewee # 16

<sup>1333</sup> Interviewee # 8

<sup>1334</sup> Code: Networking, Interviewees # 1, 2, 3, 5, 8, 9, 11, 14, 19, 21, 24, 25, 27, 32

<sup>1335</sup> Interviewee # 3

<sup>1336</sup> Interviewee # 5

<sup>1337</sup> Interviewee # 26

<sup>1338</sup> Interviewees # 24, 32

<sup>1339</sup> Interviewee # 1

initiatives of the IACs was part of their job.<sup>1340</sup> These networking initiatives automatically brought them into contact with practitioners who in turn were very receptive to speak to them, especially those that were soliciting arbitrator appointments.<sup>1341</sup> As one interviewee stated that IACs provide a platform to network, that is, to get to know the members of ICA community and in turn, be known to them.<sup>1342</sup> An institutional secretary pointed out that she would had good chances to secure employment in domestic law firms with international arbitration practice because all of them knew her due to such networking events.<sup>1343</sup> Another institutional secretary stated that she had gained some experience of administering cases and therefore, now had experiences to talk with during the networking events.<sup>1344</sup> She pointed out that this was a key difference with being a graduate when there are limited things to talk with senior practitioners. Another interviewee put it quite simply that being an institutional secretary embeds within the network of the ICA community on account of regular interaction as part of their work as well as socially.<sup>1345</sup>

Those with experience as tribunal secretaries employed different career strategies in order to join the ICA community. Broadly, five routes for appointments as tribunal secretary emerged.<sup>1346</sup> These are, first, working as tribunal secretary while pursuing doctoral research; second, working at a law firm with senior partners acting as arbitrators; third, working with an arbitrator; fourth, being an institutional secretary at an IAC that permitted its staff to be tribunal secretaries and; fifth, being an independent tribunal secretary working with multiple arbitrators. Also, three subsequent career trajectories emerged, first, transitioning to being an arbitrator; second, joining a law firm with an international arbitration practice as a counsel and; third, joining an IAC as an institutional secretary. These together present distinct set of strategies all geared towards joining the ICA community.

An interviewee who secured appointment as a tribunal secretary while working on his doctoral research stated that her supervisor had recently left the law firm and therefore, was in need of

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<sup>1340</sup> Code: Institutional Secretaries, Interviewees # 2, 3, 8, 14, 19, 32

<sup>1341</sup> Interviewees # 2, 14

<sup>1342</sup> Interviewee # 32

<sup>1343</sup> Interviewee # 2

<sup>1344</sup> Interviewee # 8

<sup>1345</sup> Interviewee # 14

<sup>1346</sup> Code: Career Trajectory

secretarial assistance.<sup>1347</sup> She cited that this led to her appointment as tribunal secretary. She also noted that this appointment led her to develop network with other arbitrators that led to subsequent appointments. She later joined an arbitration chambers setup while working with one arbitrator primarily but also assisting other arbitrators when she was available.

Another independent tribunal secretary cited working with one of the professors as she pursued her law degree as research assistant that led to her formally joining her professor's chambers.<sup>1348</sup> This led to her appointments as tribunal secretary and subsequently, as she came to know other arbitrators was able to go independent as a tribunal secretary. Another interviewee stated a similar experience of securing first appointment as tribunal secretary on account of knowing a professor from law school who had appointment as an arbitrator.<sup>1349</sup>

Multiple respondents, both arbitrators and tribunal secretaries, cited their appointments as tribunal secretary owing to working in a law firm where senior partners were acting as arbitrators.<sup>1350</sup> Eight respondents stated working as tribunal secretary because of a senior colleague in their law firm was acting as arbitrator.<sup>1351</sup> A senior arbitrator stated that this was the most obvious route to be a tribunal secretary because the appointed arbitrator can solicit support from one of the associates directly.<sup>1352</sup> Another interviewee stated that the junior associates tended to get appointed as tribunal secretaries because the finances of law firm meant that the costs for having an associate as tribunal secretary would not be high.<sup>1353</sup> She emphasized that this also had an additional benefit for the law firm because it enabled greater retention as well as provided valuable training to younger associate. An arbitrator with background as tribunal secretary echoed this reasoning as to her first appointments as tribunal secretary.<sup>1354</sup> An interviewee with experience of working as undisclosed secretary stated that as an associate, she did not have choice in the matter in as much the request for such work came from senior colleagues.<sup>1355</sup> An interviewee stated that her choice for joining a particular

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<sup>1347</sup> Interviewee # 18

<sup>1348</sup> Interviewee # 26

<sup>1349</sup> Interviewee # 14

<sup>1350</sup> Code: Career Trajectory, Interviewees # 1, 4, 6, 11, 12, 15, 17, 19, 21, 22, 24, 25, 35

<sup>1351</sup> Interviewees # 1, 11, 12, 17, 24, 25, 29, 35

<sup>1352</sup> Interviewee # 6, 15

<sup>1353</sup> Interviewee # 22

<sup>1354</sup> Interviewee # 21

<sup>1355</sup> Interviewee # 25

law firm after her graduation was on account of presence of international arbitration practice in that law firm.<sup>1356</sup> She stated that she was unaware of the role of tribunal secretary and was appointed as one immediately after joining the law firm. Another interviewee, with background as institutional secretary and an accredited tribunal secretary, stated that she was working to secure appointment as arbitrator for her seniors so as to specifically act as a tribunal secretary.<sup>1357</sup> Two senior arbitrators, both with over two decades of experience that included being tribunal secretary, stated that working with the senior partners at their law firm was the most ordinary route for those who got appointed as tribunal secretary.<sup>1358</sup>

Another path to being tribunal secretary is to work directly with an arbitrator with full-time practice as an arbitrator. This is different from the law firm route where the senior partners of the law firm act in dual capacity as counsels and arbitrators. An interviewee who worked with a leading arbitrator stated that she was conscious that her primary responsibility would be to act as a tribunal secretary to the arbitrator she was going to join.<sup>1359</sup> She secured her first appointment while working at a law firm as an associate where she came to learn about this arbitrator whom she subsequently joined and worked for number of years as her tribunal secretary.

An interviewee stated that after having experience working in law firm and with an IAC, she actively searched for appointments as tribunal secretary.<sup>1360</sup> She stated this because she wanted to learn what it meant to be an arbitrator and thus, sought such appointment. She narrated approaching multiple arbitrators before one of the arbitrators accepted her as a tribunal secretary. Subsequently, she joined an arbitration chambers setup to be able to work with multiple arbitrators before transitioning to being an arbitrator herself. Another interviewee had a similar career trajectory as the preceding interviewee with background as an institutional secretary and then, acting as tribunal secretary in an arbitration chambers setup before transitioning to the role of arbitrator.<sup>1361</sup> She specifically cited the career trajectory of the

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<sup>1356</sup> Interviewee # 17

<sup>1357</sup> Interviewee # 32

<sup>1358</sup> Interviewees # 10, 35

<sup>1359</sup> Interviewee # 29

<sup>1360</sup> Interviewee # 27

<sup>1361</sup> Interviewee # 3

preceding interviewee as an inspiration for her decision to be a tribunal secretary en route to her aspiration of being an arbitrator.

Another route for appointments as tribunal secretary was working with an IAC that permitted its institutional secretaries to act as tribunal secretaries in specific arbitrations. Four respondents had this experience of being tribunal secretary while being associated with an IAC.<sup>1362</sup> The four respondents were from three different IACs. A current head of one of these IACs explained that she saw her primary role as a jurist and thus, saw providing exposure to the conduct of arbitration as her responsibility.<sup>1363</sup> A key difference between being an institutional secretary and a tribunal secretary was to witness the conduct of arbitration closely where being an institutional secretary meant administering a large number of cases with their role heavily restricted to very narrow set of circumstances involving specific requests for clarifications by the tribunal as to the institutional rules.<sup>1364</sup> On the other hand, being a tribunal secretary afforded significant learning opportunities especially, seeing an entire arbitration run its full course, being able to see the hearings and witness the deliberations of the tribunal.<sup>1365</sup>

A former head of an IAC stated that the purpose of institutional secretaries being able to act as tribunal secretaries was in response of the needs of the market, providing learning opportunities to its staff and to retain the staff for a longer period of time.<sup>1366</sup> An institutional secretary working for an institution that permitted appointments as tribunal secretary stated that besides giving her a closer understanding of arbitration process, it enabled her to also be better at her job as institutional secretary when it came to referring names for appointment of arbitrators.<sup>1367</sup> This was so because being a tribunal secretary to a tribunal gave her a better understanding of the skills of the arbitrators themselves. Thus, this possibility of being a tribunal secretary for members of staff of IAC has also mutually beneficial outcomes for both the IAC and its staff.

Finally, another route to appointments as tribunal secretary is to work in an arbitration chambers setup. This setup is akin to the traditional barrister's chambers that involves a pool of clerks providing clerical support to multiple barristers and thus, acting as cost-saving for the

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<sup>1362</sup> Code: Institutional Secretaries, Interviewees # 2, 8, 9, 19

<sup>1363</sup> Interviewee # 7

<sup>1364</sup> Code: Institutional Secretaries, Interviewees # 3, 8, 19

<sup>1365</sup> Code: Learning by Doing; Refer Section 6.6. of Chapter 6 for fuller discussion on learning benefits associated with being a tribunal secretary.

<sup>1366</sup> Interviewee # 31

<sup>1367</sup> Interviewee # 2

barristers who could not afford a full-time clerk as well as providing avenue to work for multiple barristers for the clerks so that they can earn better.<sup>1368</sup> Five respondents worked as tribunal secretaries as part of such a setup.<sup>1369</sup> Being part of such a setup brought them into contact with arbitrators searching for secretarial support. Some stated to work primarily with few arbitrators with one interviewee stating that her work was primarily for one arbitrator.<sup>1370</sup> They acknowledged that by being in this setup, they were able to access information for potential appointments and the arbitrators benefited from their reputation of having worked with others.<sup>1371</sup> It simultaneously also provided opportunities to network as being part of such events was mandatory for the tribunal secretaries.<sup>1372</sup>

The empirical study also found respondents that were acting as independent tribunal secretaries working for multiple arbitrators without being part of an arbitration chambers style setup.<sup>1373</sup> An interviewee stated that her first appointment as tribunal secretary was while working with a law firm but now, she solicits independent appointments as both tribunal secretary and arbitrator.<sup>1374</sup> Another interviewee stated that on account of her extensive networking with the arbitrators, she has sufficient amount of work as a tribunal secretary and that she decided against joining an arbitration chambers setup on account of mandatory fees that had to be paid.<sup>1375</sup>

In order to understand career strategies of those that act as tribunal secretaries, it is also relevant to examine their career choices subsequent to being a tribunal secretary. A frequently expressed aspiration was to transition to be an arbitrator.<sup>1376</sup> However, the empirical study also found that the tribunal secretaries chose different pathways, including of being a counsel and joining an IAC as an institutional secretary.<sup>1377</sup>

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<sup>1368</sup> Interviewee # 20

<sup>1369</sup> Interviewees # 3, 5, 18, 20, 27

<sup>1370</sup> Interviewee # 3, 5, 18

<sup>1371</sup> Interviewee # 3, 18, 20, 27

<sup>1372</sup> Interviewee # 18, 20

<sup>1373</sup> Interviewee # 26, 30, 34

<sup>1374</sup> Interviewee # 30

<sup>1375</sup> Interviewee # 26

<sup>1376</sup> Code: Transition to Arbitrator

<sup>1377</sup> Code: Career Trajectory

An interviewee stated it simply that for most people who act as tribunal secretaries, the obvious end goal is to be an arbitrator.<sup>1378</sup> Multiple tribunal secretaries echoed this aspiration.<sup>1379</sup> Sixteen interviewees had experience as both an arbitrator and a tribunal secretary.<sup>1380</sup> Each of them acknowledged the importance of having being tribunal secretary later in their practice as an arbitrator. However, only two of the respondents became full-time arbitrators.<sup>1381</sup> Four of them were younger professionals taking both tribunal secretary and arbitrator appointments because they did not have enough arbitrator appointments to stop acting as tribunal secretaries.<sup>1382</sup> For the rest, it meant having a mixed practice of being both a counsel and an arbitrator. One interviewee specifically chose the route of tribunal secretary in order to join as a counsel with a global firm having a dedicated international arbitration practice.<sup>1383</sup> On a different note, one interviewee joined as an institutional secretary with a leading IAC after having acted as an independent tribunal secretary because of not having sufficient appointments.<sup>1384</sup> Another independent tribunal secretary stated that her long term goal was to be an arbitrator but would be open to joining a law firm during an intermediate period.<sup>1385</sup> This need to grow out of the role of tribunal secretary was as much an aspiration as it was due to the concerns of seniority that led to fewer appointments as tribunal secretaries.<sup>1386</sup>

### 7.3.3. SUMMING UP

This section was about the formation of the ICA community, that is, how does the ICA community renews its ranks. However, given the sophistication of the technical and specialized knowledge as well as need to train the new entrants, the post of tribunal secretary becomes a pathway to join this community.

Pierre Lalive in his debate with ICC Chairman in 1995 specifically highlighted the importance of learning by doing for those who act as tribunal secretaries.<sup>1387</sup> Another senior arbitrator,

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<sup>1378</sup> Interviewee # 24

<sup>1379</sup> Interviewee # 3, 9, 16, 19, 20, 21, 27, 30, 33, 34

<sup>1380</sup> Interviewees # 3, 9, 10, 11, 12, 13, 17, 19, 20, 21, 25, 27, 28, 30, 31, 35

<sup>1381</sup> Interviewees # 21, 27

<sup>1382</sup> Interviewees # 3, 19, 20, 30

<sup>1383</sup> Interviewee # 5

<sup>1384</sup> Interviewee # 14

<sup>1385</sup> Interviewee # 33

<sup>1386</sup> Interviewee # 27

<sup>1387</sup> Pierre Lalive, *supra* note 9.; Pierre Lalive, *supra* note 9.

Pierre Tercier, emphasized this learning by doing as “one of the best ways to train the next generation of counsel and arbitrators” with training the next generation being one of the tasks of an arbitrator.<sup>1388</sup> The respondent arbitrators were in agreement with the importance of learning that was afforded to those that act as tribunal secretaries because of their chance to witness full proceedings and see both counsels and arbitrators in action.<sup>1389</sup>

Additionally, with the professionalization of ICA, it has meant that the tribunal secretaries are able to rely on their experience to secure further career opportunities. This has meant to be able to both act as arbitrators or be a counsel.<sup>1390</sup> In effect, their experience as tribunal secretaries allows them to decide and pursue career variety of career strategies. That is, the empirical study paints a more broader picture of being tribunal secretary than simply as arbitrator’s apprentice. Though, indeed as discussed in preceding chapters, learning what it means to be arbitrator is closely tied with being a tribunal secretary. But the empirical study finds a more nuanced picture of career strategies employed by the tribunal secretaries. There are multiple avenues to be a tribunal secretary and similarly, there are multiple pathways ahead after having acted as one. In this way, it is a step in the ladder. It is not a rite of passage that every ICA practitioner has to go through but, it is a gateway to join the ICA community. It provides significant learning opportunities for those acting as tribunal secretaries to witness proceedings at close quarters and consequently, acquire skills of drafting and managing the conduct of arbitration.<sup>1391</sup> It also embeds them within the ICA community by making them known to its existing practitioners, including their skill and reputation of their work.<sup>1392</sup> They are familiarized with whole host of practitioners, including fellow tribunal secretaries but also other arbitrators and counsels.

As part of this process, the ICA community in turn renews its ranks on account of the need for skilled practitioners that the specialization of ICA requires. The accreditation programs as well as specialized academic programs are part of the career choices that the younger generation makes in its aspiration to be recognized as a practitioner of ICA. This is true for the tribunal secretaries as well.

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<sup>1388</sup> Pierre Tercier, *supra* note 9.

<sup>1389</sup> Interviewee # 4, 7, 9, 10, 17, 21, 22, 32

<sup>1390</sup> Refer Section 7.2.2

<sup>1391</sup> Code: Learning by Doing

<sup>1392</sup> Code: Networking

## **7.4. CONCLUSION: UNDER THE TUTELAGE**

In absence of any formal licensing requirements, this chapter explored that being a tribunal secretary is a step in the ladder for many of its aspiring members. This is understood so by its members, both the arbitrators and the tribunal secretaries. For the law firms, it means retaining young talent by affording the young aspirants experience of acting as tribunal secretaries. While for tribunal secretaries, it is a stepping stone as they pursue their career goals either by transiting to an arbitrator or to join a law firm as a counsel.

As the quotation from the senior arbitrator Michael Hwang at the opening of this chapter reveals that those who acted as his tribunal secretaries not only went on to pursue career opportunities in ICA but being a tribunal secretary enabled them to fraternize within the ICA community.<sup>1393</sup> Thus, a picture of social group emerges consisting of young aspirants who intend to be part of the ICA community at large and are able to use their experience as tribunal secretary to pursue further opportunities. There are multiple pathways to becoming a tribunal secretary and similarly, the tribunal secretaries pursue multiple career trajectories, including that of being an arbitrator or a counsel.

Moreover, there is unanimity that this position offers significant learning opportunities for the tribunal secretary. This is on account of witnessing a proceeding from start to finish while at the same time being able to witness the thought process of the arbitral tribunal and evaluate the actions of the counsel. Respondent tribunal secretaries were unanimous that witnessing this assisted them later in their careers, both as an arbitrator or a counsel.

To put the discussion of this chapter and the preceding two chapters to close, being a tribunal secretary is a step in the ladder to enter the ICA community.

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<sup>1393</sup> MICHAEL HWANG S. C., *supra* note 672. Pg. 18

## CHAPTER EIGHT

### A STEP IN THE LADDER

“Aspiration, so the Sage asserted,

Is the root of every kind of virtue.

Aspiration’s root in turn

Is constant meditation on the fruits of action.”<sup>1394</sup>

#### **8.1. THE INQUIRY**

This research started with the simple question: who is a tribunal secretary in ICA? This could be broken down into two related inquiries. First, what does it mean to be a tribunal secretary in practice? Second, what is the role of tribunal secretary within the ICA community? The preceding 250 pages or so are the detailed exposition to these two related questions.

The answer to the first question involved three further sub-questions. First, how do they engage with the record of the arbitration proceedings? Second, what role, if any, they have in preparations of drafts of orders and awards? Third, what role do they play during the deliberations of the tribunal?

These broad inquiries were discussed in detail in the preceding chapters. This chapter concludes this thesis by presenting its findings and conclusions.

#### **8.2. AMBITION AND LEARNING**

Ambition to join the ICA community stood out in the interviews. It was not only for those who acted as tribunal secretaries and thus, had an aspiration to be part of its community but, also the arbitrators and the heads of IACs recognized this to be the case.<sup>1395</sup> Nested within this ambition was also a recognition that the post of tribunal secretary was being formalized and thus, in turn was being professionalized with the rise of independent tribunal secretaries. This is a slow ongoing change but, is likely to become more pronounced in coming years, as younger professionals are recognizing that this is a stepping-stone to be part of the practice of ICA.

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<sup>1394</sup> SHĀNTIDEVA, THE WAY OF THE BODHISATTVA: A TRANSLATION OF THE BODHICHARYĀVATĀRA (Rev. ed. ed. 2008). Verse 7:40

<sup>1395</sup> Theme: Ambition; Refer Chapter 6 for more fuller discussion.

This is so on account of significant learning potential associated with this role. While, the observation that this post has educational advantages is not new with Pierre Lalive arguing this aspect to be the key reason for existence of tribunal secretaries.<sup>1396</sup> Because after all, all practice of law can be termed as ongoing learning and being a junior associate for an international arbitration practice of law firms also provide learning opportunities. This empirical study puts the details as to what is learned and how it is valuable for younger practitioners to be both an arbitrator as well as a counsel.<sup>1397</sup> The latter aspect too was cited as a key advantage to being a tribunal secretary in as much it was the practical experience of what arguments of the counsel work and how tribunals appreciate them.

Moreover, the practice of being tribunal secretary is deeply intertwined with drafting responsibilities ranging from assisting in boilerplate procedural orders to drafting parts of the final award. This affords the tribunal secretary to not only witness a proceeding from start to finish but also how to engage in legal writing. This includes both the neutral form of writing that is expected from the tribunal but also, advocacy writing that the tribunal secretaries go through as part of their engagement with the arbitral record.

One of the key findings was that being a tribunal secretary is an accelerated opportunity to witness an arbitration proceeding run a full course and to witness them multiple times.<sup>1398</sup> This is especially true when compared with the experience of the associates working on complex matters in law firms that usually take more time and where their tasks are confined to fewer cases. This opportunity was seen as valuable because it exposed the tribunal secretaries to not only more issues but also in a shorter time window. In effect, as an interviewee put it being a tribunal secretary is great school of arbitration.<sup>1399</sup>

### **8.3. DILIGENCE AND KNOWLEDGE OF THE FILE**

Another key finding was the emphasis by both the tribunal secretaries and the arbitrators that being a tribunal secretary meant to engage with the record and engage with it deeply to have at least the same level of knowledge as the members of the tribunal. This had a practical utility in as much it was expected of tribunal secretary to be able to answer the tribunal's request for locating something from the record. As an arbitrator put it that she expected that the tribunal

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<sup>1396</sup> Pierre Lalive, *supra* note 9.; Pierre Lalive, *supra* note 9.

<sup>1397</sup> Code: Learning by Doing

<sup>1398</sup> Code: Learning by Doing; Refer Chapter 6 for more detailed discussion.

<sup>1399</sup> Interviewee # 9

secretary is able to see the full picture and not be confined to micro-tasks.<sup>1400</sup> Or as a tribunal secretary put it that this responsibility requires engaging with the submissions because the arbitrators always are well-prepared.<sup>1401</sup>

To put it simply, being a tribunal secretary means to engage with the details of the record. Their role is justified on their ability to locate and identify any points that the tribunal may request.

#### **8.4. DRAFTING AND DELIBERATIONS**

The empirical study found a clear pattern that the tribunal secretaries were expected to provide assistance in drafting and through attendance in deliberations. There were very few exceptions to this.<sup>1402</sup> For rest of the respondents, the question was not whether to delegate drafting or allow the tribunal secretary to attend deliberations but the extent of such assistance.

The experience with drafting was varied and depended on the preferences of the arbitrators as opposed to the institutional rules that the arbitration was conducted. This was a common observation among the tribunal secretaries that it were the preferences of the arbitrators that determined the scope of their responsibilities.<sup>1403</sup> In turn, it meant that the tribunal secretaries had to adjust to the different styles of arbitrators.<sup>1404</sup> This was especially true for those who acted as independent tribunal secretaries or as part of an arbitration chambers setup.

The tribunal secretaries are expected to provide assistance in preparation of procedural orders, procedural history and factual background.<sup>1405</sup> These tasks are considered baseline for being a tribunal secretary. In turn, this explains why a significant knowledge of file is expected from them. Tribunal secretaries also developed practical techniques to carry out these activities in order to highlight any instance that required determination from the tribunal.

The empirical study also found instances where the tribunal secretaries engaged in drafting more substantive parts of procedural orders as well as awards.<sup>1406</sup> In these cases, the tribunal secretaries were given detailed instructions as to the reasoning and the content that was

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<sup>1400</sup> Interviewee # 15

<sup>1401</sup> Interviewee # 18

<sup>1402</sup> Interviewees # 9, 12

<sup>1403</sup> Code: Different Rules & Cases

<sup>1404</sup> Code: Flexibility

<sup>1405</sup> Code: Drafting, Refer Section 6.3.2. of Chapter 6 for fuller discussion on the empirical findings with respect to drafting responsibilities.

<sup>1406</sup> Refer Section 6.3.2. of Chapter 6 for detailed discussion on the drafting responsibilities.

expected. Moreover, this delegation was also reasoned on the ground of advantage of the tribunal secretary being in attendance during the deliberations.

With respect to deliberations, the tribunal secretaries were unanimous that their role was passive and confined to assisting the tribunal in locating relevant documents and taking notes. None of the interviewees recalled any instance where they were expected to make a short presentation to the tribunal members with an interviewee stating humorously that she would be petrified doing so in front of three highly experienced arbitrators.<sup>1407</sup> This inquiry was developed to better identify what it means to be in attendance during deliberation.

Another inquiry for better understanding the role during deliberations was whether any of the tribunal secretaries had intervened (or, if they had not faced such a situation, then hypothetically) in case the deliberations proceeded on an error of fact. With one exception, all the interviewees stated that they would intervene because it was their duty to ensure that the tribunal did not take a position against the record.<sup>1408</sup>

These two inquiries were designed with the specific goal of identifying the practice of attendance in deliberations.<sup>1409</sup> They lead to two inferences, first, in practice tribunal secretaries are passive and very cautious to not overstep their limits and second, they are expected to have good knowledge of file so as to be able to assist the tribunal by pointing out any issue of fact.

Putting this together, the conservative approach of not delegating any drafting responsibilities or denying the presence of the tribunal secretary during the deliberations is a minority view. It does not conform to the practice within the ICA community and moreover, significantly limits the advantages secretarial assistance brings in terms of efficiency.<sup>1410</sup>

## **8.5. THE PRINCIPLE OF *INTUITU PERSONAE* AND DIRECTION, SUPERVISION AND REVISION**

A key finding of the empirical study is the centrality of the principle of *intuitu personae* to the relationship between the arbitrators and tribunal secretaries. It acts as a shared and principled value through which the members of ICA community justify their actions when carrying them

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<sup>1407</sup> Interviewee # 29

<sup>1408</sup> Refer Section 6.4.2. of Chapter 6 for detailed discussion.; Interviewee # 11

<sup>1409</sup> Refer Section 6.4. of Chapter 6 for detailed discussion.

<sup>1410</sup> Refer Chapter 5 for detailed discussion on the practical need for tribunal secretary.

out.<sup>1411</sup> Twenty-five interviewees discussed this centrality of this principle to articulate the relationship between arbitrators and tribunal secretaries.<sup>1412</sup> Even those interviewees that acted as undisclosed tribunal secretaries highlighted the importance of this principle.<sup>1413</sup>

This principle acts a validity test to determine the tasks that maybe delegated and as a result, the extent of supervision that may in turn be called for.<sup>1414</sup> That is, it is through this principle the members of ICA community justify and explain their practices. The implication being that there is an accentuation of direction, supervision and revision as the scope of the tasks delegated to the tribunal secretaries increase. This is so because there are three broad competing mindsets to understand the relationship between tribunal secretaries and arbitrators and thus, three competing understandings of the principle of *intuitu personae* and consequent direction, supervision and revision.

The first is the most conservative one that restricts the role of the tribunal secretaries to administrative functions and permits only drafting of internal notes and boilerplate procedural orders. For instance, ICC Rules is an example of this conservative approach. While direction, supervision and revision is still emphasized but this approach circumscribes any significant drafting duties or presence during deliberations on account of seeing these as sole preserve of the arbitrators. The most liberal one permits the tribunal secretaries to carry out entire gamut of activities, including, drafting of analysis of the final award and presence during the deliberations. It visualizes that the principle of *intuitu personae* is reflected in the depth of arbitrators carrying out direction, supervision and revision so that the eventual work is owned and full responsibility of the arbitrators. The principle of *intuitu personae* is recognized in controlling the output of the tribunal secretaries to align it with what arbitrators think. A middle of the road approach is where the drafting of the analysis is done by the arbitrators but tasks like presence during deliberations, preparation of procedural history and summaries of facts and parties' position is understood to be delegable subject to subsequent review by the arbitrators.

The three broad approaches are articulated through the principle of *intuitu personae* and in turn, through the extent and depth of the direction, supervision and revision. The more conservative

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<sup>1411</sup> Andrea Bianchi, *supra* note 25.

<sup>1412</sup> Code: Intuitu Personae

<sup>1413</sup> Interviewee # 21, 25

<sup>1414</sup> Andrea Bianchi, *supra* note 25.

approach visualize the principle as creating a wall separating tasks while the more open approach visualizes this principle as duty and depth of direction, supervision and revision.

But whatever be the approach, the principle is shared mindset or paradigm within the ICA community through which it articulates, justifies and carries out its practices.<sup>1415</sup> It is the paradigm that determines the relationship between the arbitrators and the tribunal secretaries. That is, how the arbitrator understands this principle in turn effects the scope of tasks delegated to the tribunal secretary.

Irrespective of difference in approaches, it is a shared mindset that is also part of the group identity. The adherence to not delegate decision-making is understood to be paramount by both the arbitrators and tribunal secretaries. Interviewees consistently highlighted that the tribunal secretary should not volunteer views on substantive issues as integral to navigating the role of tribunal secretary.<sup>1416</sup> The same was true of the arbitrators, especially, those that had background as tribunal secretary. One unsaid implication being that those arbitrators that delegate decision-making would be eventually identified because the tribunal secretary at some point climb the ladder within the ICA community. That is, because of it being a community in constant conversation within itself through publications and events, it is difficult for an arbitrator that delegates decision-making to not be eventually identified as so.

Thus, no respondent shared their experience of being tribunal secretary, either formally or informally or without disclosure, to have made decisions and exercised judgment call.<sup>1417</sup> Looked through critical lens, it may be explained on the basis of the strength of the value of principle of *intuitu personae* within the larger ICA community where the respondents understand that over-delegation of their work to tribunal secretaries would eventually be identified and may lead to harm to their reputation. In turn, it reflects the strength of the principle of *intuitu personae* as a shared value, institution and practice within the ICA community.

## **8.6. THE VALUE OF TRANSPARENCY**

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<sup>1415</sup> Anthea Roberts, *supra* note 10.

<sup>1416</sup> Code: Navigating

<sup>1417</sup> The two interviewees who prepared drafts as they saw fit reported extensive subsequent revisions by the arbitrators. Interviewee # 24, 31. Refer Section 6.3.2. for detailed discussion on drafting responsibilities concerning reasoning and merits of the award.

An interesting find of the empirical study was that not a single arbitrator stated to have employed tribunal secretary either in an undisclosed manner or informally. This shows the strength of the value of transparency, that is, disclosing secretarial assistance to the parties prior to the appointment.<sup>1418</sup> This is exemplified in the writing of Constantine Partasides that “No more ‘secret secretary’. No more saying a secretary is only doing one thing, but doing many others.”<sup>1419</sup>

There can be two explanations as to why no arbitrator stated to have employed tribunal secretaries either in an undisclosed manner or even informally. First, that the cohort of the interviewees did not do so. That is, the sample of interviewees for this research never did it in practice. The second and more critical view is that there is unwillingness to accept it even in an anonymized interview setting as is the case with this research. This reveals the strength of the value of transparency in that its practitioners want to be seen adhering to it.

The empirical study on the other hand did elicit observations as to the prevalence of hypocrisy in relation to other arbitrators who may be acting in this manner. This is interesting in as much that while the respondent arbitrators wanted to be seen adhering to the value of transparency, they were also aware of instances where this was not the case.

and second, a more critical one being that in view of changing attitudes, as exemplified by Constantine Partasides, there is an unwillingness to accept it openly, even in an anonymized interview. However, the empirical study did elicit observations as to the prevalence of hypocrisy within the ICA community and possible reasons as to why the topic of tribunal secretary remains taboo in some corners.

Therefore, to the extent that the respondents came forward to share their experiences, it is clear that there was no instance of breach of *intuitu personae* by any of the respondents with respect to themselves. There are two ways of understanding this inference, first, that this was the case with the respondents of this study and second, that the respondents were unwilling to acknowledge having done so on account of the strength of the value of *intuitu personae*. The latter view of critically assessing the responses can be made towards those who acted as arbitrators but it is difficult to surmise and thus, extend it to those who were narrated their experience as tribunal secretaries.

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<sup>1418</sup> Refer Section 7.2. of Chapter 7 for fuller discussion.

<sup>1419</sup> Constantine Partasides, *supra* note 5. Pg. 8

## **8.7. JOINING THE ICA COMMUNITY**

The empirical study found that the younger practitioner are aware that they need to be exposed to the practice of ICA as part of building their reputation among its members.<sup>1420</sup> They understand that being a member of this community means being recognized as such and this requires them to learn its practice, build a network among its practitioners and understand the distinct culture associated with the practice of ICA.

There are multiple career strategies available to those who act as tribunal secretaries.<sup>1421</sup> There are five avenues to be a tribunal secretary. First, working as a tribunal secretary while pursuing doctoral research. Second, working with a senior partner as part of employment with a law firm. Third, working directly with an arbitrator with full-time arbitrator practice. Fourth, working as an institutional secretary with an IAC that permits its staff to act as tribunal secretaries. Fifth, working as an independent tribunal secretary or within an arbitration chambers setup for multiple arbitrators. The respondents also emphasized that the career route of being an independent tribunal secretary was a relatively recent phenomena on account of greater institutionalization of this role. This also meant that the tribunal secretaries are organizing themselves through informal association besides referring to themselves as tribunal secretaries.

Though, transitioning to an arbitrator was one of the most identified aspiration among the tribunal secretaries, their career trajectories revealed again multiple strategies. These included joining a law firm with international arbitration practice or joining as an institutional secretary with an IAC.

In a nutshell, tribunal secretary is a step in the ladder for many younger professionals in their bid to be fully part of the ICA community. It is incorrect to assume this post in contradistinction to the role of junior counsel because as the empirical study revealed that many had experience of working as a tribunal secretary precisely on account of them being a junior associate.

At core lies building relationships within the community to solicit further appointments as tribunal secretaries or seeking employment or for transitioning to the role of the arbitrator. And acting as a tribunal secretary trains them to learn the distinct mindset associated with the

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<sup>1420</sup> Refer Section 7.3. of Chapter 7 for detailed discussion.

<sup>1421</sup> Code: Career Trajectory, Refer Section 7.3.2. of Chapter 7 for detailed discussion.

practice of ICA as most notably seen with the learning and imbibing the principle of *intuitu personae*.

## **8.8. CLOSING REMARKS ON METHODOLOGICAL DECISIONS**

The thesis employs a multi-method approach to answer the inquiries. This was so as to answer the questions holistically. In order to do so, a triad of values, institutions and practices as a conceptual lens was employed.<sup>1422</sup> The benefit of this approach was that the institutional rules, extant literature and the experience of the interviewees could be integrated to answer the inquiries. As this thesis shows that it is both possible and rewarding to engage with the study of law, including ICA, by integrating what the rules say, what the extant literature reveals and what the practitioners share as their experience. This ensures that beside eliciting an answer for each of these three criterion, it is possible to study how they interact and influence each other.

Finally, the thesis also strives to contribute to empirical study of practices where fieldwork is not possible or would yield a very limited perspective.<sup>1423</sup> This is done through developing detail oriented questions, like inquiring about how drafting was carried out that may have involved decision from the tribunal or reflective inquiries, like whether the interviewee would intervene if they noticed an error of fact during the deliberations. This allows to reconstruct the practices that the tribunal secretaries had undertaken or would undertake when confronted with these circumstances. Thus, it allows to see the reality of practice as opposed to formalities where the interviewees may only answer as to what they think they should.

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<sup>1422</sup> Refer Section 3.2. of Chapter 3 for detailed discussion.

<sup>1423</sup> Refer Chapter 3 for detailed discussion as well as Sections 6.3.2. and 6.4.2. of Chapter 6 on how these questions were crafted and put to the interviewees.

## EPICTETUS'S EPILOGUE

“Suppose I were talking to an athlete and said, ‘Show me your shoulders,’ and then he said, ‘Look at my weights!’ You and your weights can see to yourselves; I want to see what the weights have done for you.”<sup>1424</sup>

Epictetus was a passionate teacher. His fame as a stoic philosopher sometimes leads to diminishing this aspect of his life. In his teachings, he emphasized two lessons consistently. First, to make right use of impressions, that is, to examine every circumstance that comes before a person. Second, to make this examination through the skill of logic and reason a constant practice.

In his own sharp words, he put the first idea as to check whether one is putting rotten ideas into oneself. By this, he meant that if at outset the approach towards learning is wrong then, it is akin to having a dirty vessel into which anything that is poured would turn into piss or vinegar.<sup>1425</sup> He was emphasizing a right attitude towards learning. That for students, in this case studying philosophy, ought to have a right frame of mind when engaging with literature otherwise, even the best of ideas would lead to poor outcomes.

The second idea that he emphasized, and quoted atop this page, was to put them consistently into practice. That is, knowing and learning were not enough unless one became habituated to put them into consistent practice until it became lived experience.

These two ideas are true as much for life as for study and practice of law. The study of law must involve engagement with its doctrines, principles and jurisprudence. Because as Gunther Teubner put it law is a discipline in itself even if plurality of social theories maybe employed to understand its many facets.<sup>1426</sup> Thus, engaging with law is to engage with its doctrines. However, that in itself is not sufficient to understand it. One must also have the right attitude of attempting to understand how the law works in action. That is, what it means to practice the law.

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<sup>1424</sup> EPICTETUS, THE COMPLETE WORKS: HANDBOOK, DISCOURSES, AND FRAGMENTS (Robin Waterfield tran., 2022). Pgs. 78-79

<sup>1425</sup> *Id.* Pg. 359

<sup>1426</sup> Gunther Teubner, *Law and Social Theory: Three Problems*, 1 ASIAN JOURNAL OF LAW AND SOCIETY 235 (2014).

This later aspect is important for both those studying the law and for those who intend to impart its teaching. A more holistic understanding of law is only possible by adding the lens of its practice, that is, how practitioners habitually, competently and meaningfully apply it in the circumstances they encounter and in turn, influence the social and the political. This thesis is an attempt in this regard towards a holistic understanding of law informed through empirical research to combine practice of law with that of written law. That the study of tribunal secretaries in ICA is informed by what it means to be a tribunal secretary in practice and how does it fit in the larger social reality of the community made of its practitioners.

I conclude the thesis with lines from the eighth century Buddhist monk, Shantideva, who put it quite simply as,

“But all this must be acted out in truth,  
For what is to be gained by mouthing syllables?  
What invalid was ever helped  
By merely reading in the doctor’s treatises?”<sup>1427</sup>

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<sup>1427</sup> SHĀNTIDEVA, *supra* note 1394. Verse 5:109, Pg. 127

## **APPENDIX A: TEMPLATE OF EMAILS**

Subject: Invitation for Conversation: Tribunal Secretary doctoral research at University of Copenhagen

My name is Hersh Sewak. I am presently PhD Student in Law at Faculty of Law, University of Copenhagen. I am a doctoral student conducting research on the professional role of Tribunal Secretaries in International Commercial Arbitration.

Given your expertise in this domain, I am writing to invite you to participate in a brief, semi-structured interview. The focal point of our conversation would be the role of the Tribunal Secretary, a critical component of my research.

The conversation is semi-structured, that is, it is a thematic interview. It is expected to be around 45 minutes. It can be scheduled as per your convenience between XXX and YYY. I would thereafter share the Zoom link for the conversation.

Your contributions to this research will be treated with the utmost confidentiality. You have the right to choose the level of attribution for the shared information, from being openly quotable to entirely anonymous. The default rule is anonymity.

I appreciate your consideration and look forward to your positive response. If you need additional information or have questions, please feel free to contact me.

Sincerely,

## **APPENDIX B: INTERVIEW CONSENT FORM**

### **Interview Consent Form**

#### **Research project: A Step in the Ladder: An investigation into global diffusion of norms and the formation of transnational legal profession through the study of Tribunal Secretary**

Participant's name:

Thank you for agreeing to be interviewed as part of the above research project. Ethical procedures for academic research undertaken from University of Copenhagen require that interviewees explicitly agree to being interviewed and as to how the information contained in their interviews will be used.

This consent form is necessary to ensure that you understand the purpose of your involvement and that you agree to the conditions of your participation.

The interview will be recorded, and a transcript will be produced.

- the transcript of the interview will be analyzed by the researcher;
- access to the interview transcript will be limited to the researchers, and academic colleagues with whom there maybe collaboratoin as part of the research process;
- any summary of the interview content, or direct quotations from the interview, that will be made available through any academic publication or other academic outlets will be anonymized so that you cannot be identified, and care will be taken to ensure that other information in the interview that could identify yourself will not be revealed;
- any variation of the conditions above will only occur with your further explicit approval;

By signing this form, I agree that:

- I am voluntarily taking part in this project. I understand that I don't have to take part in the interview, and that I can stop it at any time;
- the researchers, participating in the research project can make an audio recording of the interview and store the data in accordance with the General Data Protection Regulation (GDPR) as agreed to in a separate consent form;
- the transcribed interview or extracts from it may be used as described above;
- I have been able to ask any questions I might have, and I understand that I am free to contact the researcher with any questions I may have in the future.

Printed Name:

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Participant's Signature

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Date

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Researcher's Signature

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Date

## **APPENDIX C: CONSENT TO THE PROCESSING OF YOUR PERSONAL DATA BY A RESEARCH PROJECT**

### **Consent to the processing of your personal data by a research project**

In connection with your participation in the interviews as part of the below research project at the University of Copenhagen, we hereby request your consent to us processing your personal data. We do so under the rules in the General Data Protection Regulation (GDPR).

See the information sheet for more details about the processing of your personal data in the project.

Title of the research project:

**A Step in the Ladder: An investigation into global diffusion of norms and the formation of transnational legal profession through the study of Tribunal Secretary**

I confirm that I have read the information sheet and that this forms the basis on which I consent to the processing of my personal data by the project.

I hereby give my consent that the University of Copenhagen may register and process my personal data in the abovementioned research project.

Additionally,

I give my consent that my personal data may be stored in a database for new research projects after the end of this project.

Name: \_\_\_\_\_

Date and signature: \_\_\_\_\_

Your consent to the processing of personal data is voluntary. You may at any time change or withdraw your consent by contacting Mr. Hersh Sewak.

You can also ask to have your recordings deleted.

If you withdraw consent, it will take effect from that point in time, and will not affect the legality of our work with your data in connection with the project up to that point. Your data will therefore continue to be included in the work done by the project up until the point at which you withdraw your consent.

## Information on the processing of personal data for participants in research projects at the University of Copenhagen

Title of the research project	<b>A Step in the Ladder: An investigation into global diffusion of norms and the formation of transnational legal profession through the study of Tribunal Secretary</b>
What is the project about and and why do we collect personal data?	<p>This is a doctoral research. It is an investigation of rules and practice of International Commercial Arbitration to simultaneously investigate their doctrines as well as practice.</p> <p>The research attempts to do this through the study of formation of legal profession of International Commercial Arbitration with the Tribunal Secretary as the lens or the object of study.</p> <p>The research in this manner combines the traditional doctrinaire and jurisprudential examination of rules and laws, including, their justification and rationale with socio-empirical examination of the experience of the practitioners.</p> <p>The results of this investigation therefore contributes to the inquiries of convergence-divergence in International Commercial Arbitration, techniques of interpretation and the formation of its legal profession.</p>
What personal data does the project process?  <i>(enter the same categories listed on the project registration form)</i>	<p>The project processes the following information about the participants:</p> <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> Name</li> <li><input checked="" type="checkbox"/> Professional position and institutional affiliation</li> </ul>
For how long is personal data stored?	<p>Your data will be stored at the University of Copenhagen in personally identifiable form until 2026.</p> <p>After this date, your personal data will be anonymised / erased or archived in the Danish National Archives according to the rules in the Archives Act.</p> <p>Pursuant to the National Archives' Executive Order no. 514 of 27 April 2020 on the reporting of digital research data generated by state authorities, the University of Copenhagen must report completed research projects to the National Archives so that the National Archives can assess whether data from the project should be preserved in the National Archives. Research data derived from experiments or simulations that can be recreated will not be reported to the National Archives.</p> <p>The National Archives can provide access to personally identifiable research data archived in the National Archives after 75 years.</p>
Will personal data be passed on to others, such as researchers at other universities?	<ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> Your data collected for the project will not be passed on to others.</li> </ul>
Personal data is obtained from	<ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> We have only obtained data from you</li> <li><input checked="" type="checkbox"/> We have obtained data about you from LinkedIn, Twitter, and other available social media and/or online sources.</li> </ul>

<p>We are permitted to process your data in accordance with the rules in the General Data Protection Regulation (GDPR).</p> <p>We are obliged to inform you of the rules that apply to our work with your data.</p> <p><i>(tick the relevant rules)</i></p>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Article 6 (1) (a), which gives the University of Copenhagen the right to process non-sensitive personal data about you on the basis of your consent.</li> <li><input type="checkbox"/> Article 6 (1) (e), which gives the University of Copenhagen the right to process non-sensitive personal data about you without your consent, as the research project is deemed in the interest of society and it is necessary to process personal data in order to conduct the research project.</li> <li><input type="checkbox"/> Article 6 (1) (a) and article 9 (2) (a), which give the University of Copenhagen the right to process sensitive personal data about you on the basis of your consent.</li> <li><input type="checkbox"/> Article 6 (1) (e) and section 10 of the Danish Data Protection Act, which give the University of Copenhagen the right to process your sensitive personal data for scientific research without your consent.</li> </ul>
Participants' rights under the General Data Protection Regulation (GDPR)	As a participant in a research project, you have a number of rights under the GDPR. Your rights are specified in the University of Copenhagen's privacy policy. <a href="https://informationssikkerhed.ku.dk/english/protection-of-information-privacy/privacy-policy/">https://informationssikkerhed.ku.dk/english/protection-of-information-privacy/privacy-policy/</a>
Person responsible for storing and processing of personal data	University of Copenhagen, CVR no. 29979812, is the data controller responsible for processing personal data in the research project.  The research project is doctoral research of Mr. Hersh Sewak who can be contacted on email: <a href="mailto:hersh.sewak@jur.ku.dk">hersh.sewak@jur.ku.dk</a>

## **APPENDIX D: INTERVIEWEES**

<b><u>S. NO.</u></b>	<b><u>DATE</u></b>	<b><u>INTERVIEWEE</u></b>
1	22 <sup>nd</sup> July 2023	A trainee lawyer with arbitration practice of a global law firm and experience as a tribunal secretary.
2	24 <sup>th</sup> July 2023	An institutional secretary.
3	2 <sup>nd</sup> August 2023	An arbitrator and a tribunal secretary with background as an institutional secretary.
4	7 <sup>th</sup> August 2023	An arbitrator and an academic with over three decades of experience.
5	16 <sup>th</sup> August 2023	A tribunal secretary.
6	17 <sup>th</sup> August 2023	A senior partner with law firm with over three decades of experience as an arbitrator and an academic.
7	7 <sup>th</sup> September 2023	A head of an arbitral institution with over two decades of experience in arbitration and acting as an arbitrator and academic.
8	15 <sup>th</sup> September 2023	An institutional secretary with experience as a tribunal secretary.
9	19 <sup>th</sup> October 2023	An arbitrator and an academic with over two decades of experience with past experience as an institutional secretary and tribunal secretary.
10	11 <sup>th</sup> January 2024	An arbitrator with three decades of experience with experience as a tribunal secretary.
11	15 <sup>th</sup> January 2024	A counsel with experience as a tribunal secretary.
12	16 <sup>th</sup> January 2024	A partner with law firm with over two decades of experience in arbitration and having acted as an arbitrator.
13	17 <sup>th</sup> January 2024	A partner with law firm with over two decades of experience having acted as institutional secretary and an academic.
14	17 <sup>th</sup> January 2024	An institutional secretary.
15	23 <sup>rd</sup> January 2024	A senior partner with a law firm with over two decades of experience in arbitration and experience as an arbitrator.
16	23 <sup>rd</sup> January 2024	An associate with law firm empaneled as a tribunal secretary.-

17	24 <sup>th</sup> January 2024	A partner with a law firm with about two decades of experience that includes being an arbitrator as well as having acted as tribunal secretary.
18	24 <sup>th</sup> January 2024	An associate with law firm with a decade long experience in arbitration that includes having acted as tribunal secretary.
19	25 <sup>th</sup> January 2024	A former head of arbitral institution with experience as an arbitrator, institutional secretary and tribunal secretary.
20	25 <sup>th</sup> January 2024	An arbitrator with over a decade of experience that includes having acted as a tribunal secretary.
21	26 <sup>th</sup> January 2024	An arbitrator with over a decade of experience that includes having acted as a tribunal secretary.
22	29 <sup>th</sup> January 2024	An arbitrator with over three decades of experience that includes being global head of international arbitration practice with a global law firm.
23	30 <sup>th</sup> January 2024	An arbitrator with over three decades of experience.
24	1 <sup>st</sup> February 2024	A tribunal secretary.
25	3 <sup>rd</sup> February 2024	An independent practitioner that includes being an arbitrator as well as counsel with background of having acted as a tribunal secretary.
26	5 <sup>th</sup> February 2024	A tribunal secretary.
27	6 <sup>th</sup> February 2024	An arbitrator with over a decade of experience in international arbitration and background of having acted as a tribunal secretary.
28	8 <sup>th</sup> February 2024	An academic with over a decade of experience in international arbitration and background of having acted as a tribunal secretary.
29	8 <sup>th</sup> February 2024	An independent arbitration counsel with background as a tribunal secretary.
30	12 <sup>th</sup> February 2024	An independent arbitration counsel and arbitrator with background as tribunal secretary.
31	15 <sup>th</sup> February 2024	An independent arbitrator with over two decades of experience that includes being a former head of an arbitral institution.

32	15 <sup>th</sup> February 2024	An associate with law firm with background as an institutional secretary.
33	16 <sup>th</sup> February 2024	A tribunal secretary.
34	20 <sup>th</sup> February 2024	An arbitration professional with over two decades of experience as an arbitration counsel and an arbitrator.
35	22 <sup>nd</sup> March 2024	A partner in law firm, acting as both an arbitrator, a counsel and an academic writer with background as a tribunal secretary.

## **APPENDIX E: QUESTIONS AND CODES**

S. no.	<b><u>Theme / Question</u></b>	<b><u>Code</u></b>
<b>I</b>	<b>Theme I: Practice of Being Tribunal Secretary</b>	
1	About the administrative, logistical and organizational responsibilities.	Administrative
2	About the knowledge of the arbitral record	Knowledge of the File
3	About the drafting responsibilities, including, whether delegated drafting, what types of drafting were delegated and on what basis.	Drafting
4	About attendance, activities, role and purpose of tribunal secretaries during the deliberations.	Deliberations
5	About the guiding principle for delegation and its relationship with decision-making functions of the arbitrators.	Intuitu Personae
6	About the experience and steps for delegation of tasks.	Direction, Supervision & Revision
7	About how and on what basis do tribunal secretaries approach their role and how arbitrators see the role of tribunal secretaries.	Navigating
8	About the impact of different institutional rules, jurisdictions and types of cases on activities of tribunal secretary.	Different Rules & Cases
<b>II</b>	<b>Theme II: Relationship with the Arbitrators</b>	
9	About the relationship with the presiding arbitrator.	Chair
10	About working with different arbitrators.	Flexibility
11	About the existence and the consequence of prior relationship with the arbitrator.	Prior Relationship

12	About the disclosure of existence of tribunal secretaries, including, concerns, hesitations and experience of such disclosure.	Transparency
13	About the change in view with respect to tribunal secretaries.	Changing View
14	About the process of appointment, including the stage of appointment.	Appointment
15	About the experience of formalities of appointment.	Formal Mandate
16	About the remuneration.	Remuneration
<b>III Theme III: Becoming Tribunal Secretary and Career Navigation</b>		
17	About any learning and educational aspects of being tribunal secretary.	Learning by Doing
18	About the reasons and causes for the existence of tribunal secretaries.	Why
19	About the career trajectory, including becoming a tribunal secretary and subsequent roles and aspirations.	Career Trajectory
20	About the experience of becoming an arbitrator by those who act or acted as tribunal secretaries.	Transition to Arbitrator
21	About the role of networking as part of their career.	Networking
22	About the demonstration and acknowledgment of skills of those acting or acted as tribunal secretaries.	Demonstration & Acknowledgment
23	About the role and the experience as institutional secretaries.	Institutional Secretaries

## APPENDIX F: CODEBOOK

S. no.	<u>Code</u>	<u>Phrases</u>	<u>Meanings / Hypotheticals</u>	<u>Divergences</u>
I	<b>Theme I: Practice of Being</b>			
	<b>Tribunal Secretary</b>			
1	Administrative	Administrative, Organizational, Logistics, Coordination.	Carrying out tasks that do not engage haven't done with substance of the arbitration.	
2	Knowledge of the File	Grasp, command, Knowledge of the arbitral record mastering, knowledge, voice of the record, keeper of the record.	Depends on the case. expected from the tribunal secretaries.	
3	Drafting	Drafting, procedural, summaries, factual, analysis, merits, award.	Drafting responsibilities of the tribunal secretary; carrying out summaries and analysis. description of facts.	Haven't done as secretary.
4	Deliberations	Attendance, deliberations, deliberate.	Responsibilities, prior, during and subsequent to deliberations; making presentations or intervening on factual points.	Not every case.
5	Intuitu Personae	Decision-making, proper arbitrator, Intuitu Personae,	The principle of non-delegation of decision-making.	

		taboo, decide and communicate.	
6	Direction, Supervision & Revision	Direction, instruction, Carrying out delegation of Some could be clearer; good secretaries don't need too detailed instruction.	discussion, debate, review, responsibilities. revision, verification.
7	Navigating	Pitfalls, should do, avoid doing.	Navigating and approaching the role of tribunal secretaries.
8	Different Rules & Cases	Different institutional rules, types of cases.	Depends on the geography, difference with investment arbitration.
II	<b>Theme II: Relationship with the Arbitrators</b>		
9	Chair	Chair, presiding arbitrator.	Day to day coordination of activities.
10	Flexibility	Depends on the arbitrator, different styles, different approaches.	Experience of working with different arbitrators.

11	Prior Relationship	Super comfortable, rapport, trust.	Role of relationship with arbitrators.
12	Transparency	Disclosure, consent of parties, negative connotation, hypocrisy.	Experience of disclosure and consent of the parties. Non disclosure not the best practice, shadow, undisclosed.
13	Changing View	Change in view.	Change in view with respect to tribunal secretaries. Not, cant tell.
14	Appointment	Appointment, As early as possible, PO1.	Process of appointment, including the stage. Advanced stage.
15	Formal Mandate	Formal, Signing of Forms.	Experience of formal process of appointment. Informal, let the institution know.
16	Remuneration	Remuneration, payment.	Experience of payment or remuneration.
<b>III Theme III: Becoming Tribunal Secretary and Career Navigation</b>			
17	Learning by Doing	Learning, school of arbitration, valuable insight, training, education.	Experience of learning arbitration.
18	Why	Efficiency, focus, time saving, cost saving, retention, aspiration.	Causes for the existence of tribunal secretaries.

19	Career Trajectory	Law firm, PhD, working with arbitrator, becoming arbitrator.	Becoming tribunal secretary and navigation prospects.	Accidental, Unconventional.
20	Transition to Arbitrator	Decides, huge difference.	Experience of arbitrators acting or acted as tribunal secretaries.	
21	Networking	Network, advertise, let people know.	Role of networking.	
22	Demonstration & Acknowledgment	Acknowledged, repeat appointments.	Experience of demonstrating and/or acknowledgment of skill.	Unlucky
23	Institutional Secretaries	Institution.	Experience of working as institutional secretary.	
<b>IV</b>	<b>Theme IV: Ambition</b>		Aspiration and reasons for becoming tribunal secretary and career goals.	Keep it under control, not fourth arbitrator.
<b>V</b>	<b>Theme V: Diligence</b>		Requirement of effort as tribunal secretary.	

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